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ESTEE'S
PLEADINGS, PRACTICE
AND FORMS,

ADAPTED TO

ACTIONS AND SPECIAL PROCEEDINGS

UNDER

CODES OF CIVIL PROCEDURE.

BY
MORRIS M. ESTEE,
COUNSELOR AT LAW.

THIRD EDITION.
REVISED, ENLARGED AND REWRITTEN BY
CARTER P. POMEROY,
COUNSELOR AT LAW.

IN THREE VOLUMES.

VOL. I.

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PREFACE TO THIRD EDITION.

In the preparation of the third edition of this standard work, while the general plan of the two former editions has been mainly followed, certain changes have been made in arrangement of the several subject-matters discussed, whenever a change seemed desirable. An effort has also been made to enlarge the original scope of the work, and enhance its usefulness, by incorporating it in a large number of new forms, adapted to the needs of the profession in all the code States and Territories. The forms so added have been carefully prepared, and have uniformly been approved by the appellate courts. Whenever necessary the forms contained in the previous editions have been revised so as to harmonize with the most recent decisions. Many new and recent authorities have also been examined and cited, from all the States which have adopted the reform procedure; and whenever a change has been made in the rules and doctrines contained in the previous editions, either by judicial decision or legislative enactment, the same has been noted, and the text modified accordingly. All the citations have been carefully compared and verified by reference to the original reports, and it is confidently hoped that they will be found substantially correct. The citations have been placed in notes at the bottom of the pages, and not embodied in the text as in previous editions.

C. P. P.

San Francisco, October, 1884.

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PREFACE TO SECOND EDITION.

THE preface to the original work states all that need be said as to its plan and scope. The great favor the work has met with from the profession, as well as its intrinsic merits, which are apparent without reference to its popularity, prohibited any change in its plan in this revision.

Considerable new matter has been introduced, especially in those parts relating to parties, and to pleadings in general; while new notes and new citations of authorities have been added throughout the work wherever it seemed necessary or desirable.

The original citations have also been carefully examined, and the errors incident to a new work corrected. It is impracticable, in a work of this character, to give a statement of the point decided in each case referred to; but it is believed that each citation will be found to sustain directly, or illustrate, the point or subject to which it is cited.

The forms have also been carefully examined and, so far as necessary, corrected; and in the second and third volumes will be found many forms not contained in the original work.

At the time the original work was written, the Practice Act was in force in California—since that time the Civil Code and the Code of Civil Procedure have been adopted. So far as these codes have changed the law or practice in that State upon subjects treated of, such changes have been stated, or reference made thereto; and wherever a code is cited without giving the name of the state, the codes of California are intended.

While the code of each State having one, differs in many particulars from that of every other, yet it will be found that all are based upon common principles, and practitioners in other States will readily adapt this work to the peculiarities of their own code; and in States not having a code, the profession will find it of

great value, not only because of its numerous citations upon all leading subjects, but because it has now become necessary for common-law practitioners to become familiar with code pleading and practice.

In a work covering so many branches of the law, absolute freedom from errors should not be expected; but it is hoped and believed that its utility to the general practitioner will more than atone for its errors.

SAN FRANCISCO, July 1, 1878.

PREFACE TO FIRST EDITION.

In the preparation of this work my object has been to present to the profession the chief requisition of good pleading, with forms adapted to the modern practice, accompanied by numerous authorities sustaining them.

With this subject in view, I have commenced at the first inquiry made by the practitioner, in bringing or defending an action, and have advanced with him step by step in the prosecution or defense of the same; giving, as far as possible within the scope of this work, the law relative to the *pleadings* and *practice*, with the *forms* necessary for use, to the final disposition of the cause.

Although the forms given are specially adapted to the practice in California, Nevada and Oregon, and the Territories on the Pacific slope, yet, with rare exceptions, they are equally applicable in New York and nearly all of the other States of the Union.

The notes under the forms have been arranged alphabetically, with side heads to each, which will be found to be an index to their contents, and a majority if not all of the recent decisions, not only of the supreme courts of the Pacific States, but of the various courts of the other States of the Union, and of England, have been consulted, and brief extracts or references to them appear under the appropriate headings.

The general principles discussed in the first part of this work, as well as the general propositions at the commencement of the leading subjects, Complaints, Summons, Change of Place of Trial, Demurrer, Answer, Notices, Motions, Statement, New Trial, Appeal, etc., will, it is believed, be a guide and assistance at each stage of the proceedings.

The forms have been carefully prepared, and in general will be found correct. Many of them have been tested by the

courts of last resort, and their correctness sustained, as will be seen by reference to the authorities under each.

In submitting this book to the profession I am not unconscious of the necessity of bespeaking for it a just, if not a charitable criticism; and I trust that its imperfections, which are doubtless many, will not seriously impair its usefulness.

M. M. E.

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FOR DAMAGES UPON WRONGS.

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429. § 1704. For composing a libel not directly accusing the plaintiff of perjury.
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437. § 1751. Refusal to deal.
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439. § 1753. Refusal to retain in employ.
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441. § 1755. Charging a criminal offense.
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456. § 1822. For injuries caused by negligence on a railroad, in omitting to give signal.
457. § 1824. By a steamboat explosion.
458. § 1831. For injuries to an engineer of a railroad company, caused by a collision.
459. § 1837. Said company having used a condemned locomotive.
460. § 1841. By executor or administrator against a railroad company, for injuries causing death.
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462. § 1854. Against a municipal corporation, for injuries caused by leaving the street in an insecure state.
463. § 1864. For injuries caused by rubbish in the street, whereby plaintiff was thrown from his carriage.
464. § 1866. For injuries caused by leaving a hatchway open.
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FOR VIOLATION OF PERSONAL RIGHTS.

Form 469. § 1877. Against officers of an election, for refusing plaintiff's vote.
470. § 1880. For criminal conversation.
471. § 1884. For enticing away plaintiff's wife.
472. § 1886. For debauching a daughter.
473. § 1899. For seduction of plaintiff's daughter or servant.
474. § 1900. For seduction, by female seduced.

ESTEE'S
PLEADINGS, PRACTICE,
AND FORMS.

PART FIRST.

GENERAL PRINCIPLES.

CHAPTER I.

REMEDIES.

§ 1. Remedies, how Secured.—Remedies for wrongs are secured by a proper application to a competent court, by the party or parties entitled thereto, in an action or proceeding against the proper parties, in the form prescribed by law.

§ 2. The Same.—The proceedings in courts of justice to secure such remedies are divided by the statutes of all, or nearly all, of the states which have a code of practice or civil procedure, into: 1. Actions; 2. Special Proceedings; 3. Provisional Remedies.[1]

I. OF ACTIONS.

§ 3. What is an Action.—An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. But in some sense this definition is equally applicable to special proceedings. More accurately, it is defined to be any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree.[2] The action is said to terminate at judgment.[3]

§ 4. Actions, how Divided.—Primarily, actions are divided into two classes: Civil and Criminal. The former only will be

[1] Under the Code of Civil Procedure of California, the first and second divisions only are recognized (see sec. 21), in terms at least; though what are known under other codes as "provisional remedies" exist in California as incidents to an action.

[2] People v. County Judge of Rensselaer, 13 How. Pr. 398.

[3] Co. Lit. 289 a.

considered in this work; and the different classes into which they are divided, and the mode of proceeding therein, will be treated of hereafter.

II. OF SPECIAL PROCEEDINGS WHICH ARE NOT ACTIONS.

§ 5. **What are Special Proceedings.**—Remedies pursued by a party which do not result directly in a judgment, but only in establishing a right, or some particular fact, are special proceedings. They include proceedings confined to courts of justice, and from which an appeal will lie, such as proceedings instituted for the correction or revision of erroneous acts of a court, or officer appointed by a court, having particular qualifications, or occupying some particular relation to the parties or the subject-matter, and whose acts are in the nature of adjudications upon which the subsequent proceedings rest, however erroneous they may be.[1] The following are instances of special proceedings:

§ 6. **Admission to Practice.**—Application for admission to practice as an attorney is a special proceeding, and an appeal lies from an order denying such application.[2]

§ 7. **Appraisement.**—A proceeding by commissioners to appraise compensation for lands taken under the general railroad act.[3]

§ 8. **Arbitration and Award.**—A proceeding on arbitration is not an action.[4] It is an adjudication upon a matter in controversy, by private individuals selected and appointed by the parties.[5] Proceedings on arbitrations are not affected by the code.[6] Such proceedings are, however, regulated by statute in many of the states.

§ 9. **Assessments.**—Proceedings to assess damages on laying out a plank road, or under road laws, are not actions.[7]

§ 10. **Attachment.**—In New York, a proceeding to enforce a judgment by attachment, as for contempt, is also a special proceeding.[8]

[1] Porter v. Purdy, 29 N. Y. 106.

[2] Matter of Cooper, 22 N. Y. 67; Matter of the Graduates, 11 Abb. Pr. 301; reversing Matter of the Graduates of the University, 31 Barb. 353; 10 Abb. Pr. 348; 19 How. Pr. 97; Matter of the Graduates of Columbia, 10 Abb. Pr. 357; 19 How. Pr. 136.

[3] New York Central R. R. Co. v. Maroni, 1 Kern. 277.

[4] California Code, secs. 1281, 1290.

[5] 3 Bla. Com. 16; 3 Steph. Com. 374; Billings on Awards, 8, 55-65; Russell's Arbitrator, 112.

[6] New York Code, 836.

[7] General Laws of Cal., par. 6451; Lincoln v. Colusa Co., 28 Cal. 662; Grigsby v. Burtnett, 31 Id. 406; Ex parte Ransom, 3 N. Y. Code R. 148; Ex parte Fort Plain and Cooperstown Pl. Road Co., Id. 148; see also N. Y. Cent. R. R. Co. v. Maroni, 11 N. Y. 276.

[8] Gray v. Cook, 15 Abb. Pr. 308.

§ 11. **Certiorari.** — *Certiorari* is simply a writ of review and not of action,[1] and does not lie where there is an appeal or other remedy at law.[2] At common law it tries nothing but the jurisdiction.[3]

§ 12. **Confession of Judgment.**—A judgment by confession may be entered without action.[4]

§ 13. **Contempt.**— Proceedings in punishment for contempts are not actions.[5] Such proceedings may be for a contempt by a witness or a party for disobedience of an order of a referee;[6] for disobedience of a subpœna;[7] for refusing to testify, or to allow inspection of books;[8] for disobeying a writ of mandate or injunction;[9] for sending threatening letter to a grand jury.[10]

§ 14. **Contested Elections.** — The act giving jurisdiction over contested elections to the county judge is constitutional. It is one of the "special cases" provided for in the constitution.[11]

California Code, secs. 1067, 1068.

[2] 1 Hilt. 195; Cooper v. Kinney, 2 Id. 12; People v. Shepard, 28 Cal. 115; Miliken v. Huber, 21 Id. 166; People v. Dwinelle, 29 Id. 632; People v. Stillwell, 19 N. Y. 531; Onderdonk v. Supervisors of Queens, 1 Hill, 195; People v. Overseers of the Poor, 44 Barb. 467; Poople v. Board of Pilots, 37 Id. 126.

[3] State ex rel. Barnett v. Fifth Dist. Ct., 2 West Coast Rep. 630; People v. Delegates of San Francisco Fire Department, 14 Cal. 479. That the California statute is affirmative of the common law, see People v. Bd. of Delegates, etc., 14 Id. 479; People v. Provines, 34 Id. 520, 527, overruling People ex rel. Church v. Hester, 6 Id. 679. As to power of county courts to grant writs of *certiorari*, see Wilcox v. Oakland, 49 Id. 29, where such power is denied, except in aid of their appellate jurisdiction. It cannot be substituted for appeal: Id. As to when it lies, see Cal. P. R. R. Co. v. C. P. R. R. Co., 47 Id. 528. That district courts and judges have authority to issue the writ, see Reynolds v. County Court of San Joaquin, 47 Id. 604, and Gallardo v. Hannah, 49 Id. 136.

[4] California Code, sec. 1132; N. Y. Code, sec. 382; Gunter v. Sanchez, 1 Cal. 45, 48; see Cordier v. Schloss, 12 Id. 143; affirmed in S. C. 18 Id. 580 and cited in Wilcoxon v. Burton, 27 Id. 228, 235, in which the latter case was approved; Allen v Smillie, 1 Abb. Pr. 354; 12 How. Pr. 156; Hill v. Northrop, 9 Id. 525. And the statute must be strictly pursued. Chapin v. Thompson, 20 Cal. 681. So of proceedings on motion, setting aside a judgment by confession: Belknap v. Waters, 11 N. Y. 497; compare Bowery Extension Case, 2 Abb. Pr. 368. The purpose and true interpretation of the provisions of the code regulating confessions of judgment are explained in Hopkins v. Nelson, 24 N. Y. 518; Neusbaum v. Keim, Id 325, reversing S. C., 1 Hilt. 520; 7 Abb. Pr. 23.

[5] California Code, c. 721.

[6] Page v. Randall, 6 Cal. 32.

[7] California Code, sec. 1991; Andrews v. Andrews, Col. and C. Cas. 121.

[8] Forbes v. Meeker, 2 Edw. 452.

[9] McCauley v. Brooks, 16 Cal. 11; Golden Gate H. etc. Co. v. Superior Court, 2 West Coast Rep. 786.

[10] In re Tyler, 1 West Coast Rep. 337. For other acts which may constitute contempts see Cal. Code, sec. 1209; People v. Dorsey, 32 Cal. 296; 1 Tidd's Pr. 479, 480; 4 Bla. Com. 285; 4 Steph. Com. 348; Holstein v. Rice, 15 Abb. Pr. 307; Gray v. Cook, Id. 308. The provisions of the revised statutes concerning contempts in New York are not affected by the Code of Procedure. They are to enforce civil remedies and protect the rights of parties: People v. Compton, 1 Duer, 512; In re Smethurst, 3 Code R. 55; 2 Sandf. 724.

[11] Saunders v. Haynes, 13 Cal. 145; approved as to jurisdiction in Stone v. Elkins, 24 Id. 125, 126; Dorsey v. Barry, Id. 452; and cited in People v. Davis, 15 Id. 91; and approved as to such being "special cases" in Keller v. Chapman, 34 Id. 635, 640.

§ 15. **Highways.**—In New York, an appeal before referees in highway proceedings is not an action.[1] Nor is a proceeding to open streets.[2]

§ 16. **Indigent Relative.**—The proceeding to compel one to support an indigent relative in such states as have a statute on this subject, is a special proceeding under the act.[3]

§ 17. **Insolvency Cases.**—Insolvency cases are "special cases," and it was an exercise of legitimate power in the legislature to confer jurisdiction in such cases upon both county and district courts.[4] Proceedings in insolvency are not *stricti juris* either proceedings in law or equity, but a new remedy or proceeding created by statute.[5]

§ 18. **Joint Debtors.**—Proceedings against joint debtors after judgment are not actions.[6] In proceedings of this character, does the cause of action or right to proceed arise upon judgment or upon the original demand? The proceedings bear a strong similarity to the action of *scire facias*, and were no doubt intended as a substitute therefor.[7] Such a proceeding is not a new action, and the party served can not have the action removed into a federal court.[8] The remedy by this proceeding is merely cumulative.[9]

§ 19. **Probate.**—Probate proceedings are not civil actions within the meaning of the Practice Act.[10]

§ 20. **Referees.**—A proceeding before referees is not an action.[11] The California statute concerning referees is in aid of the common-law remedy by arbitration, and does not alter its principles.[12]

§ 21. **Review of Assessment.**—Proceedings to review the acts of assessors appointed to assess the property of the parties benefited by the construction of a sewer with their proportionate expense, are not actions.[13] A proceeding to vacate a local assessment in the city of New York is not a special proceeding in the sense of the code.[14]

[1] People v. Flake, 14 How. Pr. 527.
[2] In re The Bowery, 12 How. Pr. 97.
[3] Haviland v. White, 7 How. Pr. 154.
[4] Harper v. Freelon, 6 Cal. 76; approved in McNeil v. Borland, 23 Id. 144, 148; see also Frank v. Brady, 8 Id. 47, and People ex rel. Grow v. Rasborough, 29 Id. 415, 418.
[5] Cohen v. Barrett, 5 Cal. 195; approved as to jurisdiction in "insolvency cases" in Frank v. Brady, 8 Id. 47. That cases in insolvency are not equity cases, approved in People ex rel. Grow v. Rasborough, 29 Id. 418.
[6] California Code, secs. 989–994; N. Y. Code, sec. 375.
[7] Alden v. Clark, 11 How. Pr. 209, 213.
[8] Fairchild v. Durand, 8 Abb. Pr. 305.
[9] Dean v. Eldridge, 29 How. Pr. 218.
[10] Estate of Scott, 15 Cal. 220.
[11] California Code, sec. 636; Plant v. Fleming, 20 Cal. 92; People v. Flake, 14 How. Pr. 527.
[12] Tyson v. Wells, 2 Cal. 122; affirmed in Headley v. Reed, Id. 322; Grayson v. Guild, 4 Id. 122; Phelps v. Peabody, 7 Id. 53.
[13] Porter v. Purdy, 29 N. Y. 106.
[14] Re Dodd, 27 N. Y. 629.

§ 22. **Specific Performance.**—In New York, proceedings to compel a specific performance of contract of ancestor by heirs of deceased are not actions.[1]

§ 23. **Submission of Controversy.**—Parties may without action agree upon a case, and present a submission of the same to any court which should have jurisdiction.[2] Such a proceeding is not an action.[3]

§ 24. **Supplementary Proceedings.**—Proceedings supplementary to execution are special proceedings.[4]

§ 25. **Testimony.**—Proceedings to perpetuate testimony are not actions.[5]

III. OF PROVISIONAL REMEDIES.

§ 26. **Provisional Remedies, What Are.**—Proceedings before judgment or decree, in courts exercising equity powers, to provide for the safety and preservation of property in the possession of an adverse party, or to preserve it during the pendency of an appeal, by the appointment of a receiver or other like officer, and, in some cases, the disposition of the property after judgment or decree, and also restraining orders or injunctions pending the action, which, though now regulated by statute in most of the states, existed independently of it, as a necessary incident to equitable jurisdiction. These proceedings, however, so far as they are defined or regulated by statute, as well as others created by the statute, are usually called "provisional remedies."

The provisional remedies created by the statute, or which have been adopted from the common law, are intended to secure in advance the enforcement of the judgment which is sought to be obtained. Of these, arrest and bail, attachment of the defendant's property, and replevin or claim and delivery, are familiar examples. These provisional remedies will be treated of in connection with the actions in which they may be resorted to.

[1] Hyatt v. Seely, 11 N. Y. 52.
[2] California Code, sec. 1138; Crandall v. Amadore County, 20 Cal. 72.
[3] Lang v. Ropke, 1 Duer, 701, 702.
[4] Gould v. Chapin, 4 How. Pr. 185; Davis v. Turner, Id. 190; *contra*, Dresser v. Van Pelt, 15 Id. 19.
[5] California Code, secs. 2083, 2084.

CHAPTER II.

JURISDICTION.

§ 27. **Jurisdiction, What Is.**—Jurisdiction is the power to hear and determine a case.[1] In a more general sense it is the power to make law; the power to legislate or govern; the power or right to exercise authority.[2] Each branch of government has its functions assigned, and is beyond the control of the other departments of government.[3] Thus legislative functions can not be exercised by the judiciary.[4] Nor can the courts of justice interfere with the political powers of the legislature.[5]

§ 28. **Jurisdiction in General.**—The jurisdiction of a court will generally be presumed in the case of superior courts, or courts of general jurisdiction, where the want of it does not appear upon the record.[6] And where jurisdiction is limited by the constitution or by statute, the consent of parties can not confer it upon the court, except where the limitation is in regard to certain persons. In such case they may, if competent, waive their exemption and confer jurisdiction.[7] And conversely the agreement of parties can not operate to divest a court of its jurisdiction.[8] The distinction which exists between the want of jurisdiction and jurisdiction irregularly acquired or exercised, should be carefully noted. In the first case, the judgment can be attacked in any form directly or collaterally; in the second, only by direct proceeding in the court which rendered it.[9]

§ 29. **Jurisdiction at Chambers.**—The general rule is, that all judicial business must be transacted in court, and that there must be some express warrant of the statute to authorize

[1] United States v. Arredondo, 6 Pet. 691, 702; Grignon's Lessee v. Astor, 2 How. 319, 338; C. P. R. R. Co. v. Placer Co., 43 Cal. 365.

[2] Taylor v. Horde, 1 Burr. 113.

[3] Parsons v. Tuol. Co. Wat. Co., 5 Cal. 43.

[4] People v. Town of Nevada, 6 Cal. 143; approved in Colton v. Rossi, 9 Id. 595; Stone v. Elkins, 24 Id. 125; People v. Sanderson, 30 Id. 167.

[5] Nougues v. Douglass, 7 Cal. 65, cited in McCauley v. Brooks, 16 Id. 11, 43; Napa Valley R. R. Co. v. Napa Co., 30 Id. 435.

[6] Nelson v. Lemon, 10 Cal. 50; Nelson v. Mitchell, Id. 93; Johnson v. Sepulveda, 5 Id. 149; Grewell v. Henderson, 7 Id. 290; Gray v. Hawes, 8 Id. 562; Carpentier v. Oakland, 30 Id. 439, approved in Hahn v. Kelly, 34 Id. 391, which authority cites Forbes v. Hyde, 31 Id. 342; Sharp v. Daugney, 33 Id. 505; Clark v. Sawyer, 48 Id. 133; Hughes v. Cummings, 1 West Coast Rep. 608; Smith v. Montoya, Id. 152.

[7] Gray v. Hawes, 8 Cal. 562; Norwood v. Kenfield, 34 Id. 329; Bates v. Gage, 40 Id. 183.

[8] Muldrow v. Norris, 2 Cal. 74.

[9] Whitwell v. Barbier, 7 Cal. 54, 64, approved in Peck v. Strauss, 33 Id. 685.

any of it to be transacted at chambers.[1] A judge at chambers has no power to make an order directing the clerk of his court to enter in the minutes of the court, *nunc pro tunc*, an order alleged to have been made in open court.[2] Nor to make an order setting aside an execution issued on a judgment, and perpetually staying the enforcement of the same.[3] Nor to entertain notions to strike out pleadings or parts of pleadings.[4] In Washington territory a judge of the district court has power to render judgment at his chambers, and out of term, in a case where the defendant has made default.[5]

§ 30. **Concurrent Jurisdiction**—There is nothing in the nature of jurisdiction which renders it exclusive.[6] But, on the contrary, it may be concurrent.[7] The legislature, however, can not confer on one court the functions and powers which the constitution has given to another, where that jurisdiction is exclusive.[8] But if exclusive jurisdiction be not conferred upon a court by the constitution, then the legislature may confer on other courts the powers and functions which the constitution has conferred on that court.[9] The grant of original jurisdiction in the constitution, to a particular court, of a class of cases, without any words excluding other courts from exercising jurisdiction in the same cases, does not necessarily deprive other courts of concurrent jurisdiction in such cases.[10] Thus jurisdiction *in rem* may exist in several courts at the same time on the same subject.[11] But the court whose mesne or final process has made the first actual seizure of the thing, must have exclusive power over its disposal and the distribution of the fund arising therefrom, and the judgments of all other courts, when properly authenticated and filed in the court having custody of the fund, must be regarded as complete adjudications of the subject-matter of litigation, and be entitled to distribution ac-

[1] Larco v. Casaneuava, 30 Cal. 560; Norwood v. Kenfield, 34 Id. 332.

[2] Hegeler v. Henckell, 27 Col. 491.

[3] Bond v. Pacheco, 30 Cal. 530; Norwood v. Kenfield, 34 Id. 329, 332.

[4] Larco v. Casaneuava, 30 Cal. 560; Norwood v. Kenfield, 34 Id. 332.

[5] Murue v. Schwabacher Bros. & Co., 2 West Coast Rep. 799.

[6] Delafield v. State of Illinois, 2 Hill, 157, 164.

[7] Perry v. Ames, 26 Cal. 372. approved in Cariaga v. Dryden, 30 Id. 246; Knowles v. Yeates, 31 Id. 90; and Courtwright v. B. R. and Auburn Wat. and Min. Co., 30 Id. 585.

[8] Courtwright v. Bear Riv. and Auburn Wat. Co., 30 Cal. 580.

[9] Perry v. Ames, 26 Cal. 372; see, also, Courtwright v. B. R. and Aub. Wat. Co., 30 Id. 585. This has been practically demonstrated in American Co. v. Bradford, 27 Id. 360, cited in Hill v. Smith, Id. 476; see also People v. Davidson, 30 Id. 379; Warner v. Steamer Uncle Sam, 9 Id. 697.

[10] Courtwright v. Bear Riv. and Aub. Water and Min. Co., 30 Cal. 573.

[11] Averill v. The Hartford, 2 Cal. 309, affirmed in Taylor v. Steamer Columbia, 5 Id. 272; Meiggs v. Scannell, 7 Id. 403; Fisher v. White, 8 Id. 422.

cordingly.[1] And an action for the non-delivery of freight may exist in the district court of the United States contemporaneously with an action for freight money in a state court, without fear or danger of any collision or clashing of jurisdiction.[2] As a general rule, however, courts can not interfere with the judgments or decrees of other courts of concurrent jurisdiction.[3]

§ 31. **Jurisdiction of State Courts.**—State courts have jurisdiction in the following cases, among others, over subject-matter situated within the exclusive control of the United States government, or over parties, subjects of a foreign government, resident within the state:

(1) *Assault and Battery.*—In an action for assault and battery in a United States navy yard, although the state has ceded exclusive jurisdiction of that place to the United States.[4] So also state courts have jurisdiction of crimes committed in the United States military reservation of Fort Leavenworth.[5] The act of the legislature, ceding the navy yard at Brooklyn to the United States—which provides that the cession "shall not prevent the operation of the laws of the State" within the same—has the effect of preserving the jurisdiction of the state over offenses committed on board a government ship in the navy yard, and over the person of the offender.[6]

(2) *Contracts.*—State courts have jurisdiction over actions on a contract made in a foreign country;[7] or of an action on a policy of insurance issued in the state by a resident agent of a foreign insurance company.[8]

(3) *Customs and Duties.*—Of actions by collectors of United States customs upon receiptor's agreement;[9] and of actions on bonds given for duties to the United States.[10]

(4) *Foreign Governments* may sue and be sued in state courts in their federative names.[11]

(5) *Foreign Residents.*—State courts have jurisdiction in ac-

[1] Russell v. Alvarez, 5 Cal. 48.

[2] Id.

[3] Anthony v. Dunlap, 8 Cal. 26, affirmed in Uhlfelder v. Levy, 9 Id. 614; Revalk v. Kraemer, 8 Id. 66. For a more exhaustive discussion of the exclusive and concurrent jurisdiction of courts than the limits or purposes of this work admit of, see 1 Pomeroy's Eq. Jur., secs. 146–189.

[4] Armstrong v. Foote, 11 Abb. Pr. 384; but see Dibble v. Clapp, 31 How. Pr. 420.

[5] Clay v. State, 4 Kan. 49.

[6] People v. Lane, 1 Edm. 116.

[7] Skinner v. Tinker, 34 Barb. 333.

[8] Burns v. Provincial Insurance Co., 35 Barb. 525; Watson v Cabot Bank, 9 Sandf. 423.

[9] Sailly v. Cleveland, 10 Wend. 155.

[10] United States v. Dodge, 14 Johns. 95.

[11] Republic of Mexico v. Arrangois, 11 How. Pr. 1; Mills v. Thursby, 2 Abb. Pr. 437; Republic of Mexico v. Arrangois, 3 Id. 470; Manning v. State of Nicaragua, 14 How. Pr 517; Delafield v. State of Illinois, 26 Wend. 192; Burrall v. Jewett, 2 Paige Ch. 134; Gibson v. Woodworth, 8 Id. 132.

tions against foreign executors or administrators who are residents of the state.[1]

(6) *Habeas Corpus.*—To discharge on *habeas corpus* persons enlisted in the United States army.[2]

(7) *Property out of State.*—Where jurisdiction of the person is acquired, state courts have equitable jurisdiction in actions respecting real estate, even if the property is situated out of the state.[3] They have jurisdiction in an action for a breach of covenant to convey real property situated in a foreign state.[4] Thus, in the leading case of Penn v. Lord Baltimore, 1 Ves. sen. 444, specific performance of a contract for lands lying in America was decreed in England. So also in the case of The Earl of Kildare v. Sir Morrice Eustace and Fitzgerald, 1 Vern. 419, it was held that a trust in relation to lands lying in Ireland may be enforced in England if the trustee live in England. So if the subject of the contract or trust be within the jurisdiction, but the parties are not.[5] But the state courts have no jurisdiction of an action for injury to real estate out of that state.[6]

(8) *Torts Generally.*—State courts have jurisdiction of actions for torts committed in a foreign state, where the defendant is served with process within the state.[7] So also for a fraudulent conspiracy formed in another state.[8]

(9) *United States or U. S. Officers.*—The United States or a state may consent to be sued in a state court.[9] Or an action may be maintained in a state court against officers of the United States government in certain cases.[10]

[1] Gulick v. Gulick, 33 Barb. 92; 21 How. Pr. 22; Montalvan v. Clover, 32 Barb. 190; Sere v. Coit, 5 Abb. Pr. 482. The courts of New York have no jurisdiction in an action at law against foreign executors or administrators: Metcalf v. Clark, 41 Barb. 45.

[2] Re Carlton, 7 Cow. 471; Re Dabb, 12 Abb. Pr. 113; Re Phelan, 9 Id. 286; United States v. Wyngall, 5 Hill, 16; Re Ferguson, 9 Johns. 239. As to jurisdiction by *habeas corpus* on a commitment by a court of the United States, see Re Barrett, 42 Barb. 479; In Re Husted, 1 Johns. Cas. 136; Re Hopson 40 Barb. 34.

[3] Mussina v. Belden, 6 Abb. Pr. 165; Ward v. Arredondo, Hopk. Ch. 243; Shattuck v. Cassidy, 3 Edw. Ch. 152; Slatter v. Carroll, 2 Sandf. Ch. 573; De Klyn v. Watkins, 3 Id. 185; D'Ivernois v. Leavitt 23 Barb. 63.

[4] Mott v. Coddington, 1 Abb. Pr. (N. S.) 290; Bailey v. Rider, 10 N. Y. 363; Gardner v. Ogden, 22 Id. 327; Newton v. Bronson, 13 Id. 587; Fenner v. Sanborn, 37 Barb. 610.

[5] Arglasse v. Muschamp, 1 Vern. 75; Toller v. Carteret, 2 Id. 494; Wagner v. Watts, 2 Cranch C. C. 148; Cleveland v. Burnell, 25 Barb. 532; Newton v. Bronson, 8 Kern. 587; Rourke v. McLaughlin, Cal. Sup. Ct, July T., 1869.

[6] Mott v. Coddington, 1 Abb. Pr. (N. S.) 290; Watts v. Kinney, 6 Hill, 82.

[7] So held in New York: Hull v. Vreeland, 18 Abb. Pr. 182; Latourette v. Clark, 45 Barb. 323.

[8] Mussina v. Belden, 6 Abb. Pr. 165.

[9] The People of Mich. v. Phœnix Bk., 4 Bosw. 363

[10] Ripley v. Gelston, 9 Johns. 201; In re Stacy, 10 Id. 328; Hoyt v. Gelston, 13 Id. 141; Wilson v. McKenzie, 7 Hill, 95; Teall v. Felton, 1 Comst. 537; McButt v. Murray, 10 Abb. Pr. 196.

§ 32. **Within the Jurisdiction of the Court**, means within the state.[1] But whenever the statute prescribes certain specific acts to be done as prerequisites to the acquiring of jurisdiction, such acts must be substantially performed in the manner prescribed.[2] The jurisdiction of state courts extends to hearing and determining cases left pending in the late United States territorial courts.[3]

§ 33. **Constitutional Jurisdiction of California Courts.** In California, prior to the adoption, in 1879, of the present constitution, the jurisdiction of the several courts was fixed by the constitution, which prescribed that "the judicial powers of the state shall be vested in a supreme court, in district courts, in county courts, in probate courts, and in justices of the peace, and in such recorders and other inferior courts as the legislature may establish in any incorporated city or town."[4] The constitution of 1879 made radical changes in the judicial system of the state. Among other things, it abolished the district, county, and probate courts, as separate tribunals, and vested the jurisdiction formerly exercised by them in superior courts. The present constitution provides "that the judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in any incorporated city or town, or city or county."[5] Under its former judicial system, the California courts established several propositions which are equally applicable to the system now in existence. Among such propositions are that the legislature can not confer other than judicial functions upon any court.[6] That municipal and inferior courts can only be of inferior, limited, and special jurisdiction, and can not go beyond the power conferred upon them by statute, nor can they assume power by implication.[7] Where the statute creating a new right

[1] People v. McCauley, 1 Cal. 380; Stevens v. Irwin, 12 Id. 306.

[2] Steel v. Steel, 1 Nev. 27; Paul v. Armstrong, Id. 82.

[3] Hastings v. Johnson, 2 Nev. 190.

[4] Cal. Const. (old), art. 6, sec. 1.

[5] Cal. Const. (1879), art. 6, sec. 1.

[6] So held in Burgoyne v. Supervisors of San Francisco, 5 Cal. 9, which was affirmed in Exline v. Smith, 11 Id. 113; People v. Applegate, Id. 295; Dickey v. Hurlburt, Id. 311; Thompson v. Williams, 6 Id. 89; People v. Town of Nevada, Id. 144; Tuolumne Co. v. Stanilaus Co., Id. 442; Phelan v. San Francisco, Id. 540; Hardenburg v. Kidd, 10 Id. 403; People v. Bircham, 12 Id. 55; Phelan v. San Francisco, 20 Id. 42; People v. Sanderson, 30 Id. 167; but in People v. Provines, 34 Id. 525, the case of Burgoyne v. Supervisors of San Francisco was commented on and overruled (*obiter dictum*); see also People v. Bush, 40 Id. 344.

[7] Meyer v. Kalkmann, 6 Cal. 582, cited in Kenyon v. Welty, 20 Id. 640; Courtwright v. Bear Riv and Aub. Water and Min Co. 30 Cal. 579;

and a particular remedy for violation thereof, provides that the remedy must be pursued in a particular court, no other court has jurisdiction.[1] In such case the statute must be strictly pursued.[2] The constitution not having defined the jurisdiction of the municipal courts authorized to be established, it is left to be regulated by the legislature under its general powers.

§ 34. **Formation of the California Supreme Court.**—The supreme court of California as it exists under the present constitution consists of a chief justice and six associate justices. The court may sit in department and in bank, and is always open for the transaction of business. There are two departments, denominated, respectively, department one and department two. The chief justice is empowered to assign three of the associate justices to each department. Such assignment may be changed by him from time to time, and the associate justices may interchange among themselves by agreement. Each department has power to hear and determine causes and all questions arising therein, subject to the constitutional provisions in relation to the court in bank. The presence of three justices is necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices is necessary to pronounce a judgment. The chief justice apportions the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two of the justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in bank. If the order be not made within the time above limited, the judgment is final. No judgment by a department becomes final until the expiration of the period of thirty days, unless approved by the chief justice, in writing, with the concurrence of two associated justices. The chief justice may convene the court in bank at any time,

Winter v. Fitzpatrick, 35 Cal. 269; Morley v. Elkins, 37 Id. 454. The term "municipal courts" includes mayors' and recorders' courts: Uridias v. Morrell, 22 Id. 473, approved in Uridias v. Buzee, Cal. Sup. Ct., July T. 1863; and cited in People v. Provines, 34 Cal. 520.

[1] Smith v. Omnibus R. R. Co., 36 Cal 281.

[2] Cohen v. Barrett, 5 Id. 195.

[3] Uridias v. Morrill, 22 Id. 473.

and is the presiding justice of the court when so convened. The concurrence of four justices present at the argument is necessary to pronounce a judgment in bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four judges is necessary. In the determination of causes all decisions of the court in bank or in departments must be given in writing, and the grounds of the decisions shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.[1]

§ 35. **Election and Term of Office of Justices.**—The chief justices and the associate justices of the California supreme court are elected by the qualified electors of the state at large at the general state elections, at the times and places at which state officers are elected. Their terms of office shall be twelve years, from and after the first Monday after the first day of January next succeeding their election; provided, that the six associate justices elected at the first election shall at their first meeting so classify themselves, by lot, that two of them shall go out of office at the end of four years, two of them at the end of eight years, and two of them at the end of twelve years. If a vacancy occur in the office of a justice, the governor shall appoint a person to hold the office until the election and qualification of a justice to fill the vacancy, which election shall take place at the next succeeding general election; and the justice so elected shall hold the office for the remainder of the unexpired term. The first election of justices under the present constitution was had at the first general election after the adoption and ratification of the constitution of 1879.[2]

§ 36. **Jurisdiction of California Supreme Court.**—In general, the supreme court of California is clothed by the constitution with the powers and jurisdiction of the courts of chancery and of king's bench in England.[3] Its jurisdiction is original to a certain extent, but mainly appellate. The constitution gives it appellate jurisdiction in all cases in equity, ex-

[1] California Constitution (1879), art. 6, sec. 2. [2] Id., sec. 3.
[3] Ex parte Attorney General, 1 Cal. 85.

cept such as arise in justices' courts; also in all cases at law which involve the title or possession of real estate,[1] or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars; also in cases of forcible entry and detainer, and in proceedings in insolvency,[2] and in all such probate matters as may be provided by law;[3] also, in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone.[4] The court also has power to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction.[5] Each of the justices has power to issue writs of *habeas corpus*, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before

[1] In actions for damages to real property, when the question of title is involved, it has appellate jurisdiction, although the damages claimed are less than three hundred dollars: Doherty v. Thayer, 31 Cal. 140.

[2] Conant v. Conant, 10 Cal. 249, approved in Perry v. Ames, 26 Id. 386; People v. Rosborough, 29 Id. 418; Courtwright v. Bear River and Auburn Water and Mining Co., 30 Id. 579, affirmed in Knowles v. Yates, 31 Id 84; Dumphy v. Guindon, 13 Id. 30. So in cases of divorce: Conant v. Conant, 10 Id. 249. So in cases of contested elections on appeal from county courts: Middleton v. Gould, 5 Id. 190; Knowles v. Yates, 31 Id. 82, affirmed in Day v. Jones, Id. 263. On questions of fraud made in petition of insolvent debtor: Fisk v. His Creditors, 12 Id. 281, approved in People v. Shepard, 28 Id. 115; People v. Rosborough, 29 Id. 418. As to appellate jurisdiction generally, see Houghton's Appeal, 42 Id. 35.

[3] The appellate jurisdiction of the supreme court in probate matters is regulated by sec. 963, subd. 3 of the code of civil procedure.

[4] The supreme court may exercise its appellate jurisdiction in criminal cases confined to felony: People v. Applegate, 5 Cal. 295; affirmed in People v. Vick, 7 Id. 165; People v. Johnson, 30 Id. 101; People v. Shear, 7 Id. 139; People v. Fowler, 9 Id. 86; People v. Apgar, 35 Id. 389; see also People v. Cornell, 16 Id. 187; People v. War, 20 Id. 117; People v. Burney, 29 Id. 459; People v. Jones, 31 Id. 576. The question whether the supreme court has jurisdiction to review criminal cases upon questions of fact, raised, but not decided: People v. Dodge, 30 Id. 455. From a judgment convicting a person of contempt, and imposing on him a fine exceeding three hundred dollars, no appeal lies. Although contempt proceedings are criminal in their nature, they are not prosecuted by indictment or information: Tyler v. Connolly, 1 West Coast Rep. 779.

[5] The supreme court has original jurisdiction to issue writs of *habeas corpus*, *mandamus*, *certiorari*, and prohibition, and may exercise its appellate jurisdiction by means of such writs: Ex parte Attorney General, 1 Cal. 87; Warner v. Hall, Id. 90; Warner v. Kelly, Id. 91; Tyler v. Houghton, 25 Id. 28; Miller v. Board of Supervisors Suc. Co., Id. 93; People v. Loucks, 28 Id. 71; Courtwright v. Bear Riv. and Aub. Wat. and Min. Co., 30 Id. 585; Perry v. Ames, 26 Id. 383; Caulfield v. Hudson, 3 Id. 389; Reed v. McCormick, 4 Id. 342; Parsons v. Tuolumne, 5 Id. 43; Townsend v. Brooks, Id. 52; Zander v. Coe, Id. 230; People v. Applegate, Id. 295; People v. Fowler, 9 Id. 86; People v. Turner, 1 Id. 143; White v. Lighthall, Id. 347; Purcell v. McKune, 14 Id. 230; Flagley v. Hubbard, 22 Id. 38; Milikin v. Huber, 21 Id. 169; Lewis v. Barclay, 35 Id. 913, approving People v. Weston, 28 Id. 639; Adams v. Town, 3 Id. 247; Cowell v. Buckelew, 14 Id. 642; Hyatt v. Allen, 54 Id. 353.

himself, or the supreme court, or before any superior court in the state, or before any judge thereof.[1]

§ 37. **The Same—Legislative Power over.**—The legislature cannot take away or impair the appellate jurisdiction of the supreme court, but may prescribe the mode in which appeals may be taken.[2]

§ 38. **The Same—Amount in Controversy.**—The appellate jurisdiction of the supreme court extends to all actions in which the demand, exclusive of interest, or the value of the property in controversy amounts to three hundred dollars.[3] The amount sued for, and the value of the property in controversy, is thus the test of jurisdiction.[4] The words "property in controversy," as thus used, mean the subject of litigation, the matter for which suit is brought.[5] If an appeal is taken by the plaintiff from a judgment in his favor, then the amount in dispute is the difference between the amount of the judgment and the sum claimed by the complaint. But if the judgment is for the defendant, the jurisdiction of the supreme court is determined by the amount claimed in the complaint.[6] If the appeal is taken by the defendant from a judgment in his favor, where he set up a counter-claim, the amount in dispute is the difference between the amount of the judgment, exclusive of costs, and the sum claimed in his counter-claim. The interest due forms no part of the amount in dispute; so, also, costs constitute no part thereof.[7] Where plaintiff had judgment against defendant for six hundred dollars, and defendant had judgment in the same court, in another action, for one hundred and ten dollars, a motion by plaintiff that defendant's judgment be set off against plaintiff's judgment was denied, from which the plaintiff appealed, but the supreme court held that it had no jurisdiction, the judgment sought to be set off being less than three hundred dollars.[8]

§ 39. **Jurisdiction of Superior Court of California.** The court of general original jurisdiction in California is called the superior court. The constitution of 1879 abolished the then existing district, county, and probate courts, and estab-

[1] Cal. Const. (1879), art. 6, sec. 4.
[2] Haight v. Gay, 8 Cal. 300.
[3] California Const. (1879), art. 6, sec. 4.
[4] Maxfield v. Johnson, 30 Cal. 545; Solomon v. Reese, 34 Id. 34.
[5] Dumphy v. Guindon, 13 Cal. 28; affirmed in Meeker v. Harris, 24 Id. 286; Bolton v. Landers, 27 Id. 107; Gillespie v. Benson, 18 Id. 409; Zabriskie v. Torrey, 20 Id. 174; Votan v. Reese, 20 Id. 91.
[6] Skillman v. Lachman, 23 Cal. 198.
[7] Dumphy v. Guindon, 13 Cal. 28; Votan v. Reese, 20 Id. 89; Zabriskie v. Torrey, Id. 173; Maxfield v. Johnson, 30 Id. 545.
[8] Crandall v. Blen, 15 Cal. 407.

lished such court in their place, combining in it the powers and jurisdiction which had been previously exercised by them. The jurisdiction of the superior court is both original and appellate. It has original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; of actions of forcible entry and detainer, of proceedings in insolvency, of actio s to prevent or abate a nuisance; of all matters of probate; of divorce and for annulment of marriage, and of all such special cases and proceedings as are not otherwise provided for. It also has power to naturalize aliens, and to issue papers therefor. Such courts, and their judges, have power to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, and *habeas corpus*, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition may be issued and served on legal holidays and non-judicial days. They have appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They are always open for the transaction of business, and their process extends to every portion of the state. There is a superior court in each county of the state. The number of judges belonging to the respective courts varies from twelve in the city and county of San Francisco, to one, which is the number in most of the counties. A judge of any superior court may hold a superior court in any county, at the request of a judge of the superior court thereof, and upon the request of the governor it is his duty so to do.[1]

§ 40. **The Same—Jurisdiction in General.**—The superior court, like the district court, which it superseded, is one of general original jurisdiction; its process is co-extensive with the state;[2] and the regularity of its proceedings is presumed.[3] They have no appellate jurisdiction except such as is conferred upon them by the constitution.[4] When sitting in an equity ac-

[1] Cal. Const. (1879), art 6, sec. 5–8.

[2] Reyes v. Sanford, 5 Cal. 117.

[3] People v. Robinson, 17 Cal. 363, approved in People v. Robinson, 27 Id. 67; People v. Judge Tenth Jud. Dist., 9 Id. 19. As to the power of supervision of district courts over inferior tribunals, see Miliken v. Huber, 21 Id. 166.

[4] People v. Peralta, 8 Cal. 379; Canfield v. Hudson, Id. 389; Hernandez v. Simon, Id. 464; Gray v. Schupp, 4 Id. 185; Reed v. McCor-

tion, as for example an action to abate a nuisance, the court and judge are possessed of all the powers of a court of chancery.[1] As at present organized, the superior courts have no stated terms. Formerly the district courts lost all power over a cause, in which judgment had been rendered, upon the adjournment of the term, and could not disturb its judgments except in cases provided by statute.[2]

§ 41. **The Same—Amount in Controversy.**—In actions for the recovery of money, the superior court has jurisdiction, if the sum sued for amounts to three hundred dollars, exclusive of interest, regardless of the sum for which judgment may be obtained.[3] Where the principal sum sued for is less than two hundred dollars (now three hundred dollars) the superior court has no jurisdiction.[4]

§ 42. **The Same—Character of Action, how Determined.**—The character of the action is to be determined by the prayer of the complaint. Generally, if the prayer asks for a money judgment, it is an action at law; if it asks for the foreclosure of a lien, order of sale, etc., it is a suit in equity. In the former the superior court has no jurisdiction where the amount is less than three hundred dollars, and the *ad damnum* clause is the test.[5] In the latter it has jurisdiction, regardless of the amount claimed.[6]

§ 43. **The Same—Divorce.**—In a suit for a divorce, and partition of the property acquired during coverture, the jurisdiction of the superior court is not limited as to the amount.[7] Superior courts have jurisdiction to decree relief in alimony to the wife, in a separate action, unconnected with a suit for divorce.[8] Or, to enforce an agreement for separation and ali-

mick, Id. 342, affirmed in Parsons v. Tuol W. Co., 5 Id. 43; Keller v. De Franklin, Id. 432; Becket v. Selover, 7 Id. 240; and People v. Fowler, 9 Id. 86; Townsend v. Brooks, 5 Id. 52; Zander v. Coe, Id. 230; People v. Applegate, Id. 295, affirmed in People v. Vick, 7 Id. 166; People v. Johnson, 30 Id. 101; People v. Shear, 7 Id. 140; People v. Apgar, 35 Id 389.

[1] Sanford v. Head, 5 Cal. 297; People v. Davidson, 30 Id. 380, approved in Courtwright v. B. R & A. W. & M. Co., Id. 585; Mahlstadt v. Blanc, 34 Id. 577; Courtwright v. B. R. & A. W. & M. Co., 30 Id. 585; Wright v. Miller, 1 Sandf. Ch. 120; Reigal v. Wood, 1 Johns. Ch. 401.

[2] Suydam v. Pitcher, 4 Cal. 280, affirmed in Carpentier v. Hart, 5 Id. 407; Shaw v. McGregor, 8 Id. 521; De Castro v. Richardson, 25 Id. 52; Casement v. Ringgold, 28 Id. 388; see also Whipley v. Dewey, 17 Id. 314.

[3] Solomon v. Reese, 34 Cal. 28.

[4] Arnold v. Van Brunt, 4 Cal. 89.

[5] Maxfield v. Johnson, 30 Cal. 545; Solomon v. Reese, 34 Id. 28.

[6] People v. Mier, 24 Cal. 61, affirmed in Bell v. Crippen, 28 Id. 328; Courtwright v. Bear River and Auburn Water and Mining Co., 30 Id. 581; Mahlstadt v. Blanc, 34 Id. 577.

[7] Deuprez v. Deuprez, 5 Cal. 387.

[8] Galland v. Galland, 38 Cal. 265, citing Purcell v. Purcell, 4 Hen. & Munf. 507; Almond v. Almond, 4 Rand. 662; Logan v. Logan, 2 B. Mon.

mony in connection.[1] And, in general, whenever the wife is entitled to live separate from her husband, by reason of breaches of matrimonial duty committed by him, a concurring adjudication must be pronounced that he support her while so living.[2]

§ 44. **The Same—Forcible Entry and Detainer.**—In Nevada, district courts have jurisdiction in actions of forcible entry and detainer.[3] Previous to the present California constitution, jurisdiction in such actions was conferred upon the county courts. The present constitution vests it in the superior courts, subject to the proviso that justices' courts shall have concurrent jurisdiction in such actions, where the rental value of the property in dispute does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does exceed two hundred dollars.[4]

§ 45. **The Same—Fugitives from Justice.**—The superior courts, being courts of general original jurisdiction, exercising the usual powers of common-law courts, are fully competent to hear and determine all matters, and to issue all necessary writs for the arrest and transfer of fugitive criminals to the authorized agent of the state from which they fled, without any special legislation;[5] or to inquire into the legality of their detention under a requisition from a governor of another state.[6]

§ 46. **The Same—Abatement of Nuisances.**—Under the constitution, the superior courts have jurisdiction in actions to abate a nuisance. Such jurisdiction, being a constitutional grant, can not be taken away by the action of the legislature in attempting to confer exclusive or concurrent jurisdiction over such cases on other courts.[7] Actions to abate a nuisance would ordinarily be included within the equitable jurisdiction of a court clothed with such power. The California constitution, besides granting to the superior court general legal and equitable jurisdiction, has specially empowered it with jurisdiction of

142; Prather v. Prather, 4 Desaus. 33; Rhame v. Rhame, 1 McCord Ch. 197; Glover v. Glover, 16 Ala. 440 446.

[1] Galland v. Galland, *supra*.

[2] 2 Story's Eq. Jur., secs. 1422, 1424, Fischli v. Fischli, 1 Blackf. 360, 365; Chapman v. Chapman, 13 Ind. 397; Shannon v. Shannon, 2 Gray, 285; Sheafe v. Sheafe, 4 Fost. 564; Parsons v. Parsons, 9 N. H. 309; Lawson v. Shotwell, 27 Miss. 630; Doyle v. Doyle, 26 Mo. 545; Yule v. Yule, 2 Stockt. 138, 143; Corey v. Corey, 3 Id. 400; McGee v. McGee, 10 Ga. 477; Peltier v. Peltier, Harr. (Mich.) Ch. 19

[3] Hoopes v. Meyer, 1 Nev. 433.

[4] California Constitution (1879), art. secs. 5, 11.

[5] In re Romaine, 23 Cal. 585; 106 Mass. 225.

[6] Ex parte Robb, 1 West Coast Rep. 255, affirmed in Robb v. Connolly, U. S. Sup. Ct., Oct. T. 1883, overruling Ex parte Robb, 1 West Coast Rep. 439

[7] Fitzgerald v. Urton, 4 Cal. 235; Courtwright v. Bear River and Aub. Water and Mining Co., 30 Id. 573.

actions for the abatement of nuisances, and for the recovery of damages caused thereby. In interpreting the constitutional provisions granting such jurisdiction, and in order to give effect to each, it has been held in a very recent case, that in hearing and determining such actions the superior court sits as a special and not as an ordinary equitable tribunal; that the verdict of the jury on the general question of damages, in favor of the plaintiff, necessarily is a finding upon the right of the plaintiff to an abatement of the nuisance, and that judgment abating such nuisance may be entered upon such verdict without any other finding upon the part of the court.[1]

§ 47. **The Same—Partition.**—The superior courts have jurisdiction of actions to recover one half of the value of a partition fence, although the amount sought to be recovered is less than three hundred dollars—such action involving title to land.[2]

§ 48. **The Same—Probate.**—The jurisdiction of the superior court of California over the settlement and distribution of the estates of decedents is twofold. As a tribunal possessing the full equity jurisdiction of the English court of chancery, it has jurisdiction of an ordinary equitable action of the settlement of the estate of a decedent, notwithstanding the statutes of such state have provided a full and complete system for the administration of such estates. As the successor, under the constitution of 1879, of the former probate courts, it possesses jurisdiction to administer such estates in accordance with the statutory system.[3] The facts of the death of the deceased, and of his residence within the county, are foundation facts upon which all subsequent proceedings of the superior court, sitting as a court of probate, rest.[4] Where such court has jurisdiction of the subject-matter, all intendments are, under the statute, in favor of the correctness of the action of the court, the same as in other courts of record.[5] Thus, letters of administration upon an estate, granted by the probate court, cannot be collaterally attacked by showing that the last residence of the deceased was not in that country, and therefore that the

[1] Learned v. Castle, 3 West Coast Rep. 154.

[2] Holman v. Taylor, 31 Cal. 338.

[3] In re Allgier, 2 West Coast Rep. 876. In Rosenberg v. Frank, 58 Cal. 387, this point was examined with great care, and the effect of the statutory system of probate stated as given in the text. For a complete examination of the effect of statutory systems of probate on the equitable jurisdiction of the courts of the various states, see Pomeroy's Eq., secs. 347–352, 1153.

[4] Haynes v. Meeks, 10 Cal. 110; Townsend v. Gordon, 19 Id. 205; Estate of Harlan, 24 Id. 182.

[5] Lucas v. Todd, 28 Cal. 182; Irwin v. Scriber, 18 Cal. 499.

court had no jurisdiction.[1] The probate courts had no jurisdiction to administer upon the estates of deceased persons who died prior to the adoption of the first constitution in California; but the estates of deceased persons in such state, who died prior to the passage of the probate act of 1850, and subsequent to the adoption of the common law, can be administered on in accordance with the provisions of the probate acts in force.[2]

§ 49. **The Same—Taxes.**—An action brought before the revenue act of 1861, to recover judgment for unpaid taxes, is not a case in equity, but an action at law, and where the amount is less than three hundred dollars, the district court has no jurisdiction.[3] If, however, the action is brought under the provisions of the act of May 12, 1862, it is a case in equity, and the district court has jurisdiction, although the amount claimed is less than three hundred dollars.[4]

§ 50. **Jurisdiction of Justices' Courts in California.**—The legislature has power to determine the number of justices of the peace to be elected in townships, incorporated cities, and towns, or cities and counties, and may fix by law the powers, duties, and responsibilities of such officers, provided such powers shall not in any case trench upon the jurisdiction of the several courts of record, except that said justices shall have concurrent jurisdiction with the superior courts in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars, and in cases to enforce and foreclose liens on personal property where neither the amounts of the liens nor the value of the

[1] Irwin v. Scriber, 18 Cal. 499, affirmed; Halleck v. Moss, 22 Id. 276, Where S. dies out of the state, leaving property in Santa Clara county, and the probate court thereof takes jurisdiction of the estate and grants letters of administration to K.; the widow subsequently files a petition to revoke the letters, on the ground that the probate court of San Francisco ought to have issued them, whereupon the administrator asks the court to transfer the cause to that court, representing that the widow and a majority of the witnesses reside there, and that the interest of several persons interested in the estate would be advanced by the transfer, to which both parties agreed; the court made an order to transfer. The probate court of San Francisco, on the papers being filed therein, refused to take jurisdiction of the cause, and ordered the papers back: *Held*, that the probate court of Santa Clara could not divest itself of jurisdiction, and vest it in the probate court of San Francisco; and that *mandamus* will not issue to compel the latter court to take jurisdiction. Estate of Scott, 15 Id. 220.

[2] Downer v. Smith, 24 Cal. 114, commented on in People v. Semer, 28 Id. 505, and approved in Coppinger v. Rice, 33 Id. 423.

[3] People v. Mier, 24 Cal. 61, affirmed in Bell v. Crippen, 28 Id. 327; Courtwright v. Bear River and Aub. Water and Mining Co., 30 Id. 581; and Mahlstadt v Blanc, 34 Id. 580.

[4] Bell v. Crippen, 28 Cal. 327.

property amounts to three hundred dollars.[1] In addition to the jurisdiction given them concurrent with the superior courts, justices' courts have civil jurisdiction within their respective townships or cities, in actions arising on contracts for the recovery of money only, if the sum claimed, exclusive of interest, does not amount to three hundred dollars; in actions for damages for injury to the person, or for taking, detaining, or injuring personal property, or for injury to real property where no issue is raised by the verified answer of the defendant, involving the title to or possession of the same, if the damages claimed do not amount to three hundred dollars; in actions to recover the possession of personal property, if the value of such property does not amount to three hundred dollars; in actions for a fine, penalty, or forfeiture, not amounting to three hundred dollars, given by statute, or the ordinance of an incorporated city and county, city or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine; in actions upon bonds, or undertakings conditioned for the payment of money, if the sum claimed does not amount to three hundred dollars, though the penalty may exceed such sum; to take and enter judgment for the recovery of money on the confession of a defendant, when the amount confessed, exclusive of interest, does not amount to three hundred dollars.[2] Such jurisdiction does not extend, however, to any action or proceeding against ships, vessels, or boats, for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of the state.[3] The civil jurisdiction of such court extends to the limits of the city or township in which they are held, but mesne and final process may be issued to any part of the county in which they are held.[4] A justice of the peace has no power to vacate or set aside a judgment rendered by him, except upon a motion for a new trial.[5]

[1] California Const. (1879), art. 6, sec. 11.

[2] Code of Civil Proc., sec. 12.

[3] Code of Civil Proc., sec. 114.

[4] Code of Civil Proc., sec. 106. The criminal jurisdiction of justices' courts is fixed by section 115 of the Code of Civil Procedure. As to the organization of justices' courts in the city and county of San Francisco, under the consolidation act, see Harston's Practice, 56, et seq.

[5] Winter v. Fitzpatrick, 35 Cal. 269.

CHAPTER III.

PLACE OF TRIAL.

§ 51. **Place of Trial—In General.**—The remedy being selected, and the jurisdiction of the various courts being fixed, the next inquiry is in what county shall the proceedings be had. The code of civil procedure of California provides that actions must be tried in a particular county or district, having reference: 1. To the place where the subject-matter in controversy is situated; or 2. To the place where the cause of action arose; or, 3. To the place where the parties to the action reside, according to the nature of the questions involved. Thus, real actions, or actions affecting real property, have a tendency to a fixed and local jurisdiction; while personal actions are transitory in their character.

§ 52. **Actions to be Tried where the Subject-matter is Situated.**—The actions which are to be tried where the subject-matter, or some part thereof, is situated, subject to a change of the place of trial, are as follows: Actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property; actions for the partition of land; actions for the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.[1]

By the laws of Oregon[2] and of Iowa,[3] the recovery of personal property is included in this section, and is made a local action;

[1] Cal. Code of Civil Proc., sec. 392; N. Y. Code, sec. 123; Nash's Ohio Pl., p. 16, 17; Wash. Ter., sec. 37; Idaho, sec 18; Ariz., sec. 18. In California the constitution of 1879, art. 6, sec. 5, provides that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate or any part thereof affected by such action or actions, is situated. Whether, in view of this constitutional provision, a court other than the one designated therein would have jurisdiction of an action affecting real estate commenced out of such county, *quære*. Such provision, however, only applies to the commencement of the action. It does not prevent a change of venue, when a cause therefor exists, such as the disqualification of the judge of the county in which the land is situated: Hancock v. Burton, 61 Cal. 70.

In Washington Territory all actions for the causes mentioned in section 48, laws of 1877, must be commenced in the county or district in which the subject of the action lies. The court of no other county or district has jurisdiction thereof: Wood v. Mostick, 2 West Coast Rep. 549.

[2] Sec. 41.

[3] Sec. 2795.

while the laws of Arizona include mining claims, but make no provision for the contingency of the property or estate lying in contiguous counties.[1] In California, also, mining claims are included under the provisions of this section.[2] And while it provides for the trial in certain counties, the situation of the premises, not the residence of the parties, determines the county.[3]

The statutory requirements do not apply to actions for lands lying out of the state.[4] But to actions for the possession of real property within the state.[5] Or, for the determination of a right of interest therein.[6] Or, for the recovery of title thereto.[7] Or, for the foreclosure of mortgages thereon.[8]

§ 53. **Actions against Counties** may be commenced and tried in any county in the judicial district in which such county is situated, unless such action is between counties, in which case it may be commenced and tried in any county not a party thereto.[9]

§ 54. **Actions to be Tried where Cause of Action Arose.**—Actions must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, where the same is for the recovery of a penalty or forfeiture imposed by statute; except that, where it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed; and where the action is against a public officer, or person especially appointed to execute his duties, for an act done

[1] Code of Arizona, sec. 18.

[2] Watts v. White, 13 Cal. 321.

[3] Doll v. Feller, 16 Cal. 433.

[4] Newton v. Bronson, 3 Kern. 587; Mussina v. Belden, 6 Abb. Pr. 165.

[5] Mairs v. Ramsen, 3 Code R. 138.

[6] Wood v. Hollister, 3 Abb. Pr. 14; Starks v. Bates, 12 How. Pr. 465.

[7] Ring v. McCoun, 3 Sandf. 524; Wood v. Hollister, 3 Abb. Pr. 14; Newton v. Bronson, 13 N. Y. 587.

[8] Vallejo v. Randall, 5 Cal. 461; Marsh v. Lowry, 26 Barb. 197; 16 How. Pr. 41; Wood v. Hollister, 3 Abb. Pr. 14; but see Rawls v. Carr, 17 Id. 96; Starks v. Bates, 12 How. Pr. 465; Ring v. McCoun, 3 Sandf. 524. As to the local jurisdiction of the same tribunal of a controversy affecting property within its limits, see Nichols v. Remaine, 9 How. Pr. 512. An action for the diversion of water from the plaintiff's ditch may be brought in either of the counties in which such ditch is situated, although the defendant's place of business is in the other county where the act complained of was committed: Lower King's River etc. Co. v. King's River etc. Co., 60 Cal. 408; People's Ditch Co. v. King's River etc. Co., 1 West Coast Rep. 473.

[9] California Code Civil Proc., sec. 394. In the absence of special statutory provisions, such suits are governed by the usual rules of civil practice; and where a county was sued in a judicial district of which it did not form a part, but appeared and answered without objecting to the jurisdiction, it thereby waived the right to a change of venue to its own district: Clarke v. Lyon County, 8 Nev. 181.

by him in virtue of his office, or against a person who, by his command or his aid, does anything touching the duties of such officer.[1] These provisions have been held not to apply to official neglects or omissions, but merely to affirmative acts of officers.[2] Nor do they apply to officers of the United States.[3]

§ 55. Actions to be Tried where Defendants Reside.—In all cases except those above mentioned the action must be tried in the county in which the defendants or some of them reside at the commencement of the action; or if none of the defendants reside in the state, or if residing in the state and the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the state, such action may be tried in any county where either of the parties reside, or service is had; subject, however, to the power of the court to change the place of trial.[4] In actions against corporations, the principal place of business of the corporation is its residence,[5] and the action should be brought there. Action for divorce by a wife living apart from her husband may be brought against him in the county where she resides.[6]

Actions to recover damages for injuries to the person should be brought under this section,[7] and also actions for creating a private nuisance, the same being an action for an injury to the person.[8] In *quo warranto*, the people being a party, their residence extends to every county.[9] In proceedings for a *man-*

[1] California Code Civil Proc., sec. 393; N. Y. Code, sec. 124; Oregon, sec. 42; Wash. Terr., sec. 38; Idaho, sec. 19; Ariz., Id. In Ohio and Iowa, in addition, "an action on the official bond of an officer:" Nash's Ohio Pl., sec. 47; Iowa Code, sec. 2796; also, Park v. Carnley, 7 How. Pr. 355; People v. Hayes, Id. 248; Brown v. Smith, 24 Barb. 419; Howland v. Willetts, 5 Sandf. 219, affirmed in 5 Seld. 170; Porter v. Pillsbury, 11 How. Pr. 240; People v. Cook, 6 Id. 448; Houck v. Lasher, 17 Id. 520.

[2] Elliott v. Cronk's Adm'r, 13 Wend. 85; Hopkins v. Haywood, Id. 265; McMillan v. Richards, 9 Cal. 420.

[3] Freeman v. Robinson, 7 Ind. 321.

[4] Cal. Code of Civil Proc., sec. 395; N. Y. Code, sec. 125; Oregon, sec. 43; Idaho, sec. 20; Arizona, sec. 20.

[5] Jenkins v. Cal. Steam Nav. Co., 22 Cal. 537; Hubbard v. Nat. Pro. Ins. Co., 11 How. Pr. 149; Pond v. Hudson River R. R. Co., 17 How. Pr. 543. As to foreign corporations, see International Co. v. Sweetland, 14 Abb. Pr. 240. As to the residence of railroad corporations, see Vermont R. R. Co. v. Northern R. R. Co., 6 How. Pr. 106; Sherwood v. Saratoga R. R. Co., 15 Barb. 650; Belden v. N. Y. & Harl. R. R. Co., 15 How. Pr. 17; People v. Pierce, 31 Barb. 138; Conroe v. Nat. Pro. Ins. Co., 10 How. Pr. 403; Hubbard v. Nat. Pro. Ins. Co., 11 Id. 149; see, however, Pond v. Hudson River R. R. Co., 17 Id. 543.

[6] Harteau v. Harteau, 14 Pick. 181; Jenney v. Jenney, 14 Mass. 231; 2 Id. 153. 156; 3 Id. 184; 2 Com. & H. notes. 879; 9 Greenl. 147; Vence v. Vence, 15 How. Pr. 497; Id. 576.

[7] McIvor v. McCabe, 16 Abb. Pr. 319.

[8] Ray v. Sellers, 1 Duvall (Ky.), 254.

[9] People v. Cook, 6 How. Pr. 448.

damus to compel the execution of a sheriff's deed to a redemptioner, the action may be commenced in the county where the relator resides.[1] The writ of *habeas corpus*, however, should not issue to run out of the county, unless for a good cause shown.[2]

§ 56. **Change of Place of Trial.**—After service of summons and copy of complaint, the attorney for defendant should make inquiry by examining the complaint as to whether the action is brought in the proper county, and if it is not, and a change of venue is desired, the first thing to be done is to move the court for a change of the place of trial. This may be done upon affidavit of merits and notice to the plaintiff. In California, the notice to be given as to time is, five days before the time appointed for the hearing, when the court is held in the same district with both parties; otherwise, ten days, unless the notice is served by mail.[3]

§ 57. **The Cause.**—If the county in which the action be commenced is not the proper county for the trial thereof, the defendant has a statutory right to have the same transferred to such county.[4] It may, however, be tried in the county in which the action is brought, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county.[5] Besides the right of the defendant to a change of venue because the county designated in the complaint is not the proper county, the court may also, on motion, change the place of trial when there is reason to believe that an impartial trial can not be had therein; when the convenience of witnesses and the ends of justice would be promoted by the change; and when from any cause the judge is disqualified from acting.[6] If the defendant desires a change of the place of trial, on the ground that the county designated in the complaint is not the proper county, he must demand a transfer at the time he appears by demurrer or answer. If his motion to change

[1] McMillan v. Richards, 9 Cal. 420.

[2] Ex parte Ellis, 11 Cal. 225. In New York, where the parties reside in different counties the suit shall be commenced in the county where the principal transaction occurred, or where it appears the largest number of witnesses reside: Jordan v. Garrison, 6 How. Pr. 6. "Transaction," when relating to a contract, includes the whole proceeding, beginning with the negotiation, and ending with the performance: Robinson v. Flint, 7 Abb. Pr 393, note.

[3] California Code C. P., sec. 1005. As to which is the proper county, see Cal. Code C. P., secs. 392–395.

[4] Bailey v. Sloan, 1 West Coast Rep. 472.

[5] California Code C. P., secs. 396.

[6] California Code C. P., sec. 397; Idaho, sec 21; Arizona, sec. 21; N. Y. Code, sec. 987.

the place of trial is brought to a hearing before he has answered, the plaintiff can not, by a cross-motion, demand the retention of the action in the county where it is pending, on the ground of convenience, etc.[1] It is only in cases where the change is asked because the county designated in the complaint is not the proper county that the motion for the change must precede or accompany the answer or demurrer. The motion may be made by the defendant, on any other statutory ground, without the affidavit and demand, within a reasonable time after his appearance. Such motions, however, being dilatory, must be prosecuted with diligence.[2]

§ 58. **The Same—The Plaintiff in an Action may have the Place of Trial Changed** upon a proper showing, and upon a proper showing it is error in the court to refuse.[3] Where, however, there are conflicting grounds, or if the motion be made on the ground of the convenience of witnesses, and there are conflicting affidavits, the court may exercise its discretion, and its ruling will not be disturbed except in cases where this discretion has been abused.[4] The mere preponderance of witnesses on one side is not necessarily decisive of the motion.[5] Nor is the court bound of its own motion to change the venue. The right to a change is a mere privilege which may be waived.[6]

§ 59. **Demand for Change.**

Form No. 1.

[TITLE.]

I hereby demand that the place of trial of this cause be changed to the proper county, viz., the county of .....

[DATE.] [SIGNATURE.]

[ADDRESS.]

In New York, to procure a change of the place of trial, in case the county named is not the proper county, a demand is first necessary, the service of which is an essential prerequisite to the motion.[7] And if the plaintiff fails to consent to the demand, application must be made to the court.[8] A demand is

[1] Tooms v. Randall, 3 Cal. 438; Reyes v. Sanford, 5 Id. 117; Pearkes v. Freer, 9 Id. 642; Jones v. Frost, 28 Id. 246; Mahe v. Reynolds, 38 Id. 560; Cook v. Pendergast, 61 Cal. 72; Heald v. Hendy, 3 West Coast Rep. 102.

[2] Cook v. Pendergast, 61 Cal. 72–78.

[3] Grewell v. Walden, 23 Cal. 168, 169.

[4] Territory v. Kinney, 1 West Coast Rep. 801; Territory v. Lopez, Id. 821.

[5] Hanchett v. Finch, 47 Cal. 192; Cook v. Pendergast, 61 Id. 72.

[6] Watts v. White, 13 Cal. 324; Pearkes v. Freer, 9 Id. 642. It may be remarked that, as this proceeding is entirely statutory, and the former practice in New York differed quite materially from that in California, the decisions in New York have generally but little application under the California practice.

[7] New York Code, ed. 1877, sec. 986; Vermont Central R. R. Co. v. Northern R. R. Co., 6 How. Pr. 106.

[8] March v. Lowry, 16 How. Pr. 41; 26 Barb. 197; Houck v. Lasher, 17 How. Pr. 520.

now necessary also in California, where the ground of removal is that the action is not brought in the proper county.[1] The object of the demand in California, however, is not very apparent, since there is no provision for removal by consent as under sections 985 and 986 of the New York code; nor is there any provision for any action by the court upon the demand, nor does the demand do away with the necessity for notice of the motion to change, and the only provision authorizing the removal is in California Code of Civil Procedure, section 397. "The court may on motion change the place of trial," etc. It has been held by some of the district courts that service of notice of motion to change the place of trial is a sufficient demand.

§ 60. **Statement in Demand.**—In the demand the name of the proper county to which a removal is sought must be inserted.[2] And service must be made on the opposite counsel before the time for answering expires.[3] But it may be made simultaneously with the service of the answer.[4] But not after, although defendant answered before his time had expired.[5] Either party may move when an impartial trial could not be had, or when convenience of witnesses would be promoted.[6] A demand specifying an improper county is irregular.[7] On a demand there must be an order or consent; mere service of demand is not sufficient.[8] In a demand to change the place of trial to the proper county, any suggestion as to which is the proper county is surplusage.[9] Under the present New York code the demand must specify the county where the defendant requires the action to be tried.[10] And such would seem the better practice in California.

§ 61. **Form of Notice.**

Form No. 2.

[TITLE.]

To....., Attorney for Plaintiff.

You will please take notice that the defendant will move this court, at the court-room thereof, ..., on the ..... day of ....., 18...., at ten o'clock A. M. of said day, or as soon

[1] *Ante*, and California Code C. P., sec 396.
[2] Beardsley v. Dickerson, 4 How. Pr. 81.
[3] Milligan v. Brophy, 2 Code R. 118.
[4] Mairs v. Remsen, 3 Code R. 138.
[5] Milligan v. Brophy, 2 Code R. 118.
[6] Hinchman v. Butler, 7 How. Pr. 462.
[7] Beardsley v. Dickerson, 4 How. Pr. 81.
[8] Hasbrouck v. M'Adam, 4 How. Pr. 342; 3 Code R. 39.
[9] Philbrick v. Boyd, 16 Abb. Pr. 8.3.
[10] New York Code, sec. 986.

thereafter as counsel can be heard, for an order changing the place of trial of this action to the superior court in and for the county of ..... Said motion will be made upon affidavits, copies of which are herewith served upon you, and upon the demand to change the place of trial, and the papers on file in the case, upon the following grounds: —

I. That the property in controversy is situated in said ..... county.

II. That the defendants are both residents of said ..... county.

III. That this is an action against defendant ..... for an act done by him in virtue of his office, said defendant being sheriff of ..... county.

A. B.,
Defendants' Attorney.[1]

[DATE.]

§ 62. **Joinder of Defendants.**—The rule is well settled that all of the defendants must join in the application for a change of venue, or a good reason shown why they do not; otherwise it will be denied.[2] The motion may be made by one of several defendants [3] on notice to the other defendants, unless they be in default; or a defendant subsequently served, after a similar motion by another defendant has been denied, may move for a change of place of trial.[4] This, however, seems questionable, and can not be done where part of the defendants live in the county where the action is brought, if the motion is made on the ground that the action is not brought where defendants reside.[5]

§ 63. **Statement of Ground—Not the Proper County from Situation of Subject-matter.**

Form No. 5.

[Substitute in preceding form.]

That this is an action for the recovery of real property [or of an estate, or interest therein, or for the determination in some form of such right or interest, or for injuries to real property], and that the said real property is wholly situate in the said last named county (Cal. Code C. P., section 392, subd. 1).

[Or that this is an action for the partition of real property, which said property is wholly situate in the said county to

[1] The applicant may give other statutory reasons, according to the facts in each particular case.

[2] Sailly v. Hutton, 6 Wend. 508; Legg v. Dorsheim, 19 Id. 700; Welling v. Sweet, 1 How. Pr. 156; Simmons v. McDougall, 2 Id. 77.

[3] Mairs v. Remsen, 8 Code R. 138; Job v. Butterfield, 1 Eng. Law and Eq. 417.

[4] N. J. Zinc Co. v. Blood, 8 Abb. Pr. 147.

[5] See California Code C. P., sec. 395.

which the desired change is asked (Cal. Code C. P., sec. 392, subd. 2).

[Or, that this is an action for the foreclosure of a mortgage of [or lien upon] real property, and that the land in said mortgage [or lien] described is wholly situate in said last-named county] (Cal. Code C. P., sec. 392, subd. 3).[1]

§ 64. The Same—Not the County where Cause of Action Arose.

Form No. 4.

[Substitute in Form No. 2.]

That this is an action for the recovery of a penalty or forfeiture imposed by statute, except, etc. (see Cal. Code C. P., sec. 303, subd. 1); and that it arose in the said last-named county.

Or, that this is an action against defendant for an act done by him in virtue of his office, said defendant being the ..... of said last-named county, and a resident thereof (Cal. Code C. P., sec. 393, subd. 2); [or when the act complained of was done by, and suit was brought against a person who, by command of such officer, or in his aid, performed the act which is the subject of the action, add] and that such person is a resident of the last-named county, etc.[2]

§ 65. Affidavit on the Ground of Non-residence.

Form No 5.

[TITLE.]
[VENUE.]

A. B., the defendant in the above-entitled action, being duly sworn, deposes and says as follows:

I. The summons and complaint in this action were served on me on the ..... day of ....., 18...

II. I further say, that I have fully and fairly stated the case in this cause to G. H., my counsel, who resides at No. ....., in .... street, in the city of ....., and after such statement I am by him advised and verily believe that I have a good and substantial defense on the merits to the action.

III. All the parties defendant to this action reside in the county of ....., in this state.

[JURAT.] [SIGNATURE.]

[1] Mining claims are real estate within the meaning of this act, and are governed by the provisions of this section. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not a demurrer, is the proper remedy. And in such case there is no discretion in the court, the change being a matter of right: Watts v. White, 13 Cal. 321.

[2] It is not expected that each form given will exactly fit each case, as it arises in the practice—but the general form i deemed correct.

§ 66. **The Same—Affidavit of Merits.**—An affidavit of merits, which declares "that the defendant has fully and fairly stated the case to his counsel, and that he has a good and substantial defense on the merits to the whole of the plaintiff's demand, as he is advised by his counsel, and verily believes to be true," is sufficient.[1] The affidavit of merits must be made and served with notice of motion.[2] It is a common and convenient practice to combine the affidavit of merits with the affidavit of the ground on which the motion is made, where the latter does not appear upon the face of the complaint, and has to be established by affidavit.

§ 67. **The Same—Residence of Parties.**—The principal place of business of a corporation is its residence, within the meaning of that term.[3] A willful or careless ignorance of the residence of the defendant does not put it in the power of the plaintiff to sue him in any county of the state, however remote from his residence. To resist the application of the defendant, the plaintiff should have shown that he used all proper diligence to ascertain the residence of the defendant before suit, and failed.[4] The motion to change on the ground of non-residence of defendant can not be resisted on the ground that the convenience of witnesses requires the action to be retained where it is commenced. And if the court refuses to grant the change when asked for on such ground, where the motion is made at the time of defendant's demurring or appearance, it is ground for reversal on appeal.[5]

§ 68. **Affidavit on Ground of Partiality and Prejudice.**

Form No. 6.

[TITLE.]

[VENUE.]

[Same as in Form No. 5, down to III.]

III. I have reason to believe and do believe that I can not have a fair and impartial trial in said court in which this action is brought, by reason of the interest, prejudice, and bias of the people of said county [give the facts]. A. B.

[JURAT.]

§ 69. **The Same—Circumstances to be Stated.**—It is necessary to state in the affidavit facts and circumstances which

[1] Butler v. Mitchell, 17 Wis. 52.

[2] Lynch v. Mosher, 4 How. Pr. 86. As to sufficiency of affidavit of merits, consult Richards v. Sweetzer, 1 Code R. 117; Ellis v. Jones, 6 How. Pr. 296; Rickards v. Sweetzer, 3 Id. 413; Jordan v. Garrison, 6 Id. 6; Mixer v. Kuhn, 4 Id. 409, 412.

[3] Jenkins v. Cal. Stage Co., 22 Cal. 537; see *ante*.

[4] Lohr v. Latham, 15 Cal. 418.

[5] Cook v. Pendergast, 61 Cal. 72; Bailey v. Sloan, 1 West Coast Rep. 472; Heald v. Hendy, 3 Id. 102; Williams v. Keller, 6 Nev. 141.

induce the belief that an impartial trial can not be had, in order that the court may judge whether the belief is well founded; the affidavits of individuals to their belief that an impartial trial can not be had are insufficient.[1] It has been said that an actual experiment should be first made by attempting to impanel a jury, or by at least one trial of the cause.[2] But this rule has not been sustained, and other circumstances than an actual trial are sometimes held sufficient evidence that an impartial trial can not be had.[3]

§ 70. **The Same—Amount of Partiality or Prejudice Necessary.**—The general sentiments of the community respecting the merits of an exciting case may be such an obstacle to the administration of justice that a change should be ordered.[4] But the court will not grant a change of venue on the ground that the prejudices of the people of the county are against turnpike roads, in an action where such a company is a party.[5] Nor is it a ground for a change of venue that the people of the county in which the action is to be tried are generally interested in the question involved.[6] Nor in an action against a sheriff, will the influence of his office be sufficient reason.[7] But a change of venue will be ordered when it appears that one hundred citizens united in employing counsel to prosecute the defendant.[8] But not because a high party spirit prevails.[9]

§ 71. **Affidavit on Account of Convenience of Witnesses.**

Form No 7.

[TITLE.]
[VENUE.]
[Same as in No. 5, down to III.]

III. I have fully and fairly stated to my counsel the facts which I expect to prove by each and every one of the following witnesses, viz.: J. K., L. M., and O. P.; and each and every one of them is a material and necessary witness for my defense

[1] Bowman v. Ely, 2 Wend. 250; People v. Bodine, 7 Hill, 147; People v. Vermilye, 7 Cow. 108, 137; Scott v. Gibbs, 2 Johns. Cas. 116; Corp. of N. Y. v. Dawson, Id. 335; Sloan v. Smith, 3 Cal. 410; State v. Millain, 3 Nev. 409.

[2] Messenger v. Holmes, 12 Wend. 203; People v. Wright, 5 How. Pr. 23.

[3] People v. Webb, 1 Hill, 179; People v. Long Island R. R. Co., 4 Park. Cr. 602; Budge v. Northam, 20 How. Pr. 248.

[4] People v. Baker, 3 Park. Cr. 181, 187; S. C., 3 Abb. Pr. 42.

[5] New Windsor Turnpike Co. v. Wilson, 3 Cai. 127.

[6] Conley v. Chedic, 7 Nev. 336.

[7] Baker v. Sleiget, 2 Cai. 46.

[8] People v. Lee, 5 Cal. 353.

[9] Zobieskie v. Bauder, 1 Cai. 487. In general, granting or refusing change of venue on account of the partiality or prejudice of the citizens of the county is discretionary with the court, subject to revision only in cases of abuse. Watson v. Whitney, 23. Cal. 375.

on the trial of this cause, as I am advised by my said counsel, and verily believe, and that without the testimony of each and every one of the said witnesses, I can not safely proceed to the trial of this cause, as I am also advised by my said counsel, and verily believe.

IV. That each and every one of said witnesses reside in the county of ....., viz.: [State the residence of each.]

V. The facts which I expect to prove by said witnesses are as follows: By J. K., the fact that, etc.; by L. M., that, etc.

[JURAT.] [SIGNATURE.]

§ 72. The Same—What Affidavit should State.—The affidavit should be made by the defendant himself, but may be made by defendant's attorney where special reasons are shown [1] The facts expected to be proved must be stated in the affidavit, and wherein they are material must be shown.[2] And the facts that each is expected to prove should be specifically stated where there is any contest as to the convenience of witnesses.[3] The affidavit should state the witnesses' names and residence. The statement that they are residents of the county merely is not sufficient.[4] As the place of trial will be determined by the county in which the witnesses reside rather than by the distance they must travel.[5] That each and every one is a necessary witness must appear, and that without the testimony of each he could not safely proceed, is also essential.[6] The words "every one of them" are held essential.[7] It must appear that the witnesses are necessary as well as material.[8] And wherein they are material, and that without them he can not safely go to trial.[9] Very little reliance is placed by the courts upon a general allegation of the materiality of witnesses, unless it be shown wherein they are material.[10] The affidavit in New York should state among other things, that he fully and fairly stated his case to counsel: 9 Wend, 431; 3 Cow. 14; giving name and residence of such counsel, and has fully and fairly disclosed to him the facts which he expects to prove by each;" and that he

[1] Scott v. Gibbs, 2 Johns. Cas. 116.
[2] People v. Hayes, 7 How. Pr. 248.
[3] Price v. Fort Edward Water Works, 16 How. Pr. 51.
[4] Anonymous, 6 Cow. 389; Westbrook v. Merritt, 1 How. Pr. 195; see Pierce v. Gunn, 3 Hill, 445.
[5] Hull v. Hull, 1 Hill, 671; People v. Wright, 5 How. Pr. 23.
[6] Onondaga Co. Bk. v. Shepherd, 19 Wend. 10; Satterlee v. Groot, 6 Cow. 33; 8 Id. 425; 6 Id. 389; Constantine v. Dunham, 9 Wend. 431.
[7] See cases cited in preceding note.
[8] Satterlee v. Groot, 6 Cow. 33; see Young v. Scott, 3 Hill. 32, 35.
[9] Anonymous, 8 Wend. 424; Constantine v. Dunham, 9 Id. 431.
[10] People v. Hayes, 7 How. Pr. 248.
[11] 9 Wend. 10; Hemingway v. Spaulding, 1 How. Pr. 70; Robinson v. Merritt, Id. 165; Anonymous, 1 Hill, 668; Am. Ex. Bank v. Hill, 22 How. Pr. 29; 3 Cow. 14.

has a good and substantial defense upon the merits.[1] When defendant is himself a counselor, the affidavit may be modified accordingly.[2] It should also state the name of the county designated in the complaint as the county of trial.[3] And if not made by all the defendants, the reason why.[4]

§ 73. **The Same—Granting Motion Discretionary.**—The granting or refusing of a motion to change the venue on the ground of convenience of witnesses is discretionary with the trial court, and subject to review only in cases of abuse.[5]

§ 74. **The Same—When Motion may be Made.**—It would seem that in Nevada an application for change of venue for convenience of witnesses is proper after answer filed and cause set for trial.[6] In New York the motion for change on this ground can not be made before issue joined,[7] and the same is true in California.[8] Consequently a plaintiff can not, before issue joined, use this ground to resist a motion to change the venue, made by the defendant, on the ground of non-residence in the county in which the action is brought.

§ 75. **Affidavit on the Ground of Disqualification of the Judge.**

Form No. 8.

[TITLE.]
[VENUE.]
[Same as in No. 5 down to III.]

III. That the Hon. X. Y., judge of the court in which the complaint in this action is filed, is disqualified from presiding in the same [he being related to the plaintiff within three degrees of consanguinity, to wit: a brother of the plaintiff; or he having heretofore acted as counsel in this action on the part of the plaintiff.][9]

[DATE.] [SIGNATURE.]

§ 76. **The Same—What Amounts to Disqualification—Bias or Prejudice.**—Bias or prejudice on the part of the judge constitutes no legal incapacity to sit on the trial of a cause, nor is it a sufficient ground to authorize a change of place of trial. The fact alone that the judge, on a previous trial of the same

[1] President etc. v. Board of Supervisors, 1 How. Pr. 162.
[2] Cromwell v. Van Rensselaer, 8 Cow. 346.
[3] Bull v. Babbitt, 1 How. Pr. 184; 1 Hill, 668.
[4] Welling v. Sweet, 1 How. Pr. 156.
[5] Pierson v. McCahill, 22 Cal. 127.
[6] Sheckles v. Sheckles, 3 Nev. 404.
[7] Mason v. Brown, 6 How. Pr. 431; Merrill v. Grinnell, 10 Id. 31; Toll v. Cromwell, 12 Id. 79; Hubbard v. Nat. Ins. Co., 11 Id. 149.
[8] Cook v. Pendergast, 61 Cal. 72.
[9] This affidavit is rarely if ever made as a rule; the bare suggestion to the judge of any one of these facts is sufficient. As to what constitute disqualifications, see Cal. Code C. P., sec. 170.

cause, made an erroneous ruling, is no evidence of the existence of bias or prejudice in his mind.[1] Nor is the exhibition by a judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper, and reprehensible, as calculated to throw suspicion upon the judgment of the court, and bring the administration of justice into contempt, sufficient to authorize a change of venue, on the ground that the judge is disqualified from sitting. The law establishes a different rule for determining the disqualification of judges from that applied to jurors.[2]

§ 77. **The Same—Consanguinity.**—The statutes of all of the states disqualify judges from hearing and determining causes when they are related to the parties therein. The statute of California, which may be taken as an example in this regard, provides that no judge shall sit or act as such in any action or proceeding, when he is related to either party by consanguinity or affinity, within the third degree. Such disqualification, however, does not prohibit him from arranging the business of his court, or from transferring such action to some other court.[3] Even if no objection is made, he has no right to act, and ought, of his own motion, to decline to sit as judge. In such case an order of the judge dismissing the action is void, on the ground of his incapacity to act.[4]

§ 78. **The Same—Counsel in the Case.**—It is sufficient cause for removal that the judge where the venue was laid has been counsel or attorney in the case.[5] Thus where the probate judge held a power of attorney from certain persons claiming to be the heirs at law of the deceased, and authorizing him to receive for them all money and property which they might be entitled to from the estate, for which he was to receive a percentage upon the proceeds of the estate, and that these proceedings were instituted at the instance of said probate judge, a change of venue should be granted.[6]

§ 79. **The Same—Interested in the Action.**—Judges are prohibited from hearing and determining causes in which they are parties or in which they are interested. Statutes to this effect prevail in all the states, and should receive a broad and

[1] People v. Williams, 24 Cal. 31.
[2] McCauley v. Weller, 12 Cal. 500.
[3] Cal. Code Civil Proc., sec. 170; De la Guerra v. Burton, 23 Cal. 592.
[4] People v. José Ramon de la Guerra, 24 Cal. 73.
[5] Cal. Code Civil Proc., sec. 170; 2 Wend. 290
[6] Estate of White, 37 Cal. 190; citing Oakley v. Aspinwall, 3 N. Y. 547.

liberal interpretation rather than one that is technical or strict.[1] This prohibition does not extend to cases where the interest is simply in some question of law involved in the controversy, or when it is indirect and remote. It does not extend to all cases where the interest of the judge is a direct and immediate interest in the result of the action. Thus in an action for an injunction, where the property of the judge was equally subject to injury by the acts sought to be enjoined as the property of the plaintiff and where the injunction sought would equally protect his property, the judge is disqualified from acting, and a writ of prohibition will lie to restrain him from proceeding in the action, although the court over which he presides has jurisdiction of the cause.[2]

§ 80. **The Same—Form of Affidavit.**— An affidavit made on application to change the place of trial which states "that the judge, as the affiant is informed, and verily believes, has frequently stated that he believes the affiant guilty of the crime charged in the indictment, and has frequently expressed himself against and adversely to the affiant in connection with said charge," does not merit consideration, as it contains a mere charge upon information and belief, and does not show how the information was obtained, or upon what the belief was based.[3] And we might add, that such an affidavit, unless some facts are stated, ought to subject the party making it to punishment for contempt.

§ 81. **The Same—Transfer of Cause.**— Where a judge is incapacitated to act as such, the action should be transferred—not dismissed; an order dismissing the action would be null and void.[4]

§ 82. **Affidavit Resisting Motion for Change.**

Form No. 9.

[TITLE.]
[VENUE.]

A. B., plaintiff above named, being duly sworn, says as follows:

I. I have fully and fairly stated to E. F., my counsel in this cause, who resides at ....., in the county of ...., the facts which I expect to prove by each and every one of the following witnesses, viz.: G. H., of the town of .....; J. K., of the town of ....; L. M., of the town of .....,

[1] Stockwell v. Township Board of White Lake, 22 Mich. 350; The North Bloomfield Gravel Mining Company v. Keyser, 58 Cal. 315.

[2] The North Bloomfield Gravel Mining Company v. Keyser, 58 Cal. 315.

[3] People v. Williams, 24 Cal. 31.

[4] Burton v. Covarrubias, California April term, 1865, not reported.

all of whom reside in said county of .....; and that they are, each and every one of them, material and necessary witnesses for me on the trial of this cause, as I am advised by said counsel, and as I verily believe; and that without the testimony of each and every one of said witnesses I can not safely proceed to the trial of this cause, as I am also advised by my said counsel, and verily believe.

II. That the facts which I expect to prove by said witnesses are as follows [state in detail the facts and circumstances expected to be proved by each witness, naming him, and the materiality of those facts].

[JURAT.] [SIGNATURE.]

§ 83. **The Same—Form of Affidavit.**—Affidavits to oppose a motion for a change of place of trial on the ground of convenience of witnesses should be, in form and substance, similar to the moving affidavits of the defendant, and should state what is expected to be proved by the witnesses,[1] and their names.[2]

§ 84. **The Same—When Plaintiff may Oppose.**—In New York, a motion to change the place of trial on the ground that the county named in the complaint is not the proper county can not be resisted by the plaintiff, prior to issue joined, on the ground of convenience of witnesses.[3] In California the practice is the same although a different opinion formerly prevailed.[4] Nor can the hearing of defendant's motion, made at the time of his appearance and demurring, be postponed by the court until his answer is filed, and leave granted to the plaintiff to make a cross-motion to retain the case on the ground of convenience of witnesses.[5] If the plaintiff desires a re-change to the county in which the action is brought, he should make a cross-motion to that effect.[6] If the state of the case is such that the plaintiff has a right to resist the motion for a change of venue, time to file counter-affidavits may be allowed him in the discretion of the court.[7] The voluntary appearance of a party resisting a motion for a change of venue gives the court jurisdiction over his person, and waives all prior informalities.[8]

[1] Onondaga Co. Bank v. Shepherd, 19 Wend. 10; American Ex. Bank v. Hill, 22 How. Pr. 29.

[2] Loehr v. Latham, 15 Cal. 418.

[3] International L. Ass. Co. v. Sweetland, 14 Abb. Pr. 240.

[4] Cook v. Pendergast, 61 Cal. 72; Bailey v. Sloan, 1 West Coast Rep. 472. *Contra:* Loehr v. Latham; 15 Cal. 418; Jenkins v. California Stage Co., 22 Id. 537; Hall v. C. P. R. R. Co., 49 Id. 454.

[5] Heald v. Hurdy, 8 West Coast Rep. 102.

[6] Cook v. Pendergast, 61 Cal. 72; Moon v. Gardner, 5 Abb. Pr. 243.

[7] Pierson v. McCahill, 22 Cal. 127.

[8] Powers v. Browder, 18 Mo. 154.

§ 85. **Order Denying Motion.**

Form No. 10.

[TITLE.]

At a regular term of the superior court of the county of ....., state of California, held at.....

Present, the Honorable ....., Judge.

The motion to change the place of trial in this action coming on regularly to be heard this day, A. B., Esq., appearing in favor of said motion, and C. D., Esq., appearing in opposition thereto, and the court being duly advised, it is ordered that the motion to change the place of trial in this action be and the same is hereby denied [with ..... dollars costs].

§ 86. **Dismissal—Effect of.**—When two motions are pending in an action at the same time, one to change the venue, and one to dismiss, an entry of a judgment of dismissal, without any formal order denying the motion to change the venue, is a virtual denial of the same.[1]

§ 87. **When Motion will be Denied.**—The motion will be denied where it is clear that the defendant's object is merely delay.[2] As where nearly six months had elapsed before the motion was made, and long after the defendant had answered.[3] Or where by stipulation evidence is confined to facts occurring in the county where venue is laid.[4] Or where plaintiff undertook to bear all expenses of bringing defendant's witnesses.[5] Or where, after service of papers for a motion to change venue, plaintiff amended his complaint changing the venue.[6] Or agreed to change the venue; or where defendant suffered a default.[7] A change of venue is properly refused, unless a party has complied with the requisites of the statute.[8] Probably delay of trial in the county which would otherwise be most convenient is a reason for refusing the change.[9]

§ 88. **The Same—Appeal from.**—An appeal from an order refusing to change the venue of an action, operates as a stay of all further proceedings in the case in the court below until such an appeal is determined.[10] An order refusing a change of venue on the application of defendant in a criminal prosecution will only be reviewed in cases of gross abuse of discretion.[11]

[1] People v. José Ramon de la Guerra, 24 Cal. 73.

[2] Kilbourne v. Fairchild, 12 Wend. 293; Garlock v. Dunkle, 22 Id. 615.

[3] Tooms v. Randall, 3 Cal. 438.

[4] Smith v. Averill, 1 Barb. 28.

[5] Worthy v. Gilbert, 4 Johns. 492; but see Rathbone v. Harman, 4 Wend. 208.

[6] Wolverton v. Wells, 1 Hill, 374.

[7] Britton v. Peabody, 4 Hill, 69.

[8] Lewin v. Dille, 17 Mo. 64.

[9] King v. Vanderbilt, 7 How. Pr. 385; Goodrich v. Vanderbilt, Id. 467.

[10] Pierson v. McCahill, 23 Cal. 249.

[11] People v. Fisher, 6 Cal. 154.

But it is not to be supposed that the supreme court will trust implicitly in the discretion of inferior courts.[1]

§ 89. Order Granting Change of Place of Trial.

Form No. 11.

[Commencement as in preceding form.]

It is ordered that the place of trial of this action be and hereby is changed from the county of ..... to the county of .....

§ 90. **The Same—Effect of.**— It is error for the court to refuse to change the place of trial upon a proper showing.[2] But the fact that the affidavit for a change of venue may be defective will not render the order changing the venue a nullity, nor should the case be dismissed for this defect. The objection should be made at the time the petition for a change is acted upon.[3] So, also, although the affidavit upon which the application to change the venue of an action is made may not show any legal cause for such change, still if the court grants the application, it has acted judicially upon a matter within its cognizance, and where it was clothed with discretion, and by the order the place of trial becomes changed.[4]

§ 91. **The Same—Proceedings and Practice.**— In California, when an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, must transmit the pleadings and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made. The court to which the action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.[5] If the defendant procures a change of venue, the plaintiff may pay the costs and transmit the papers to the county fixed as the place of trial, and have the case placed on the calendar and tried.[6] In some states, on a motion to change the place of trial, the costs were usually made to abide the event of the suit, whether the motion be granted or denied.[7] But it may be otherwise where the plaintiff has not complied with a demand.[8]

[1] People v. Lee, 5 Cal. 353.
[2] Grewell v. Walden, 23 Cal. 165.
[3] Potter v. Adams' Executors, 24 Mo. 159.
[4] The People v. Sexton, 24 Cal. 78.
[5] Cal. Code Civil Proc., 399.
[6] Brooks v. Douglass, 32 Cal. 208.
[7] Gidney v. Spelman, 6 Wend. 525; Norton v. Rich, 20 Johns. 475; but see Worthy v. Gilbert, 4 Id. 492.
[8] Hubbard v. National Protection Ins. Co., 11 How. Pr. 149. As to costs in special cases, see Purdy v. Wardell 10 Wend. 619; Donaldson v. Jackson, 9 Id. 450.

§ 92. **The Same—Service of Order.**—In New York, a certified copy of this order must be served upon the plaintiff; otherwise the plaintiff may proceed as if the place of trial had not been changed.[1] An appearance and trial is a waiver of any irregularity in this regard.[2]

§ 93. **Order to Transfer Cause to Another Court, on Account of Disability of the Judge.**

Form No. 12.

[TITLE.]

It being shown to the court by G. H., of counsel for the defendant, that the judge of this court was heretofore of counsel in a cause involving the same title which is in issue in this cause:

It is ordered, that this cause be transferred to the superior court of the county of.....for trial.

§ 94. **Notice of Time and Place of Trial of Transferred Action.**

Form No 13.

[TITLE.]

To A. B., the plaintiff in the above entitled action, and C. D., the defendant in said action:

You will please take notice that the said action, transferred to the above-entitled court from the.....court of the..... township, in ....., county of ....., is set for trial before me, at my court-room, in said ..... township, in said ..... county, the ..... day of ..... 18.., at ..... o'clock, P. M.

J. P.,

[DATE.] Justice of the Peace of said ..... township.[3]

§ 95. **Removal of Causes from State to United States Courts—Statutes Affecting.**—The principal statutes of the United States, authorizing and regulating the transfer of causes from the state courts to the courts of the United States, have been the acts of 1789, 1866, 1867, and 1875. The twelfth section of the judiciary act of 1789, the act of July 27, 1866, and of March 2, 1867, though technically repealed, are substantially embodied in section 639 of the revised statutes of the United States. There are other provisions of the statute covering the transfer of a limited number of special cases, but section 639 of the revised statutes, and the act of March 3, 1875 (adopted since the revised statutes, and not found therein), provide for nearly all the cases met with in ordinary practice. For the last-named act, see acts of 1875, p. 470.

[1] Root, Adm'r etc. v. Taylor, 18 Johns. 335; Keep v. Tyler, 4 Cow. 541.
[2] Bettis v. Logan, 2 Mo. 4.
[3] See California Code Civil Proc., sec. 836.

§ 96. **Special Cases.**—The special cases not falling within section 639, or the act of 1875, are the following: 1. Causes civil and criminal, in any state court, against persons denied civil rights;[1] 2. Suits, civil and criminal, against revenue officers of the United States, and a ainst officers and other persons acting under the registration laws;[2] 3. Suits by aliens against civil officers of the United States, under specified circumstances;[3] and, 4. Suits against certain federal corporations, or their members as such.[4] Section 640 is as follows:

"Any suit commenced in any court other than a circuit or district court of the United States against any corporation other than a banking corporation organized under a law of the United States, or against any member thereof as such member, may be removed, for trial, in the circuit court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the constitution or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section."

§ 97. **Suits against Corporations Organized Under Law of the United States.**—Under this section a petition for removal must state that the corporation or member applying for the removal "has a defense arising under or by virtue of the constitution of the United States, or some treaty or law of the United States," but the facts constituting the defense need not be stated, nor what the defense is.[5] In Magee v. U. P. R. R. Co., 2 Saw. C. C. 447, which was an action for a personal injury to the plaintiff, and the only defense made by the answer was a denial of the negligence, the decision of which depended entirely upon common-law principles, and did not involve the construction of any act of congress, the cause was, on motion, remanded to the state court. The decision was made by Hillyer, J., in 1873.[6] In 1875, in Turton v. U. P. R. R. Co., 3 Dillon C. C. 366, Justice Miller held the other way on the same state of facts. If the holding of the latter case is correct, there would seem to be no necessity for requiring the verified statement, in the petition for removal, that the defendant has a defense under or by virtue of the constitution or some treaty or

[1] U. S. R. S., secs. 641, 642.
[2] Id., sec. 643.
[3] Id., sec. 644.
[4] Id., sec. 640.
[5] Jones v. Oceanic Steam Nav. Co., 11 Blatchf. 406; Magee v. U. P. R. R., 2 Saw. 447; Fisk v. U. P. R. R., 8 Blatchf. 243.
[6] See also Texas v. Railroad Co., 3 Woods, 308.

law of the United States; for if such defense arises from the mere fact of incorporation under a law of the United States, a statement that it is such corporation would evidently be sufficient; but Jones v. Oceanic Steam Nav. Co., *supra*, holds that it is not sufficient. In the case of this corporation, however, the charter authorizes it to sue or be sued in the circuit court of the United States, and jurisdiction having been conferred by the action of the state court, it is not clear that it was improperly retained.

§ 98. **Removable Causes.**—Section 639 of the revised statutes, and the act of 1875, are so important that we copy the material parts.

Sec. 639. "Any suit commenced in any state court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the circuit court for the district where such suit is pending, next to be held after the filing the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section. First. When the suit is against an alien, or is by a citizen of the state wherein it is brought, and against a citizen of another state, it may be removed on the petition of such defendant, filed in said state court at the time of entering his appearance in said state court. Second. When the suit is against an alien and a citizen of the state wherein it is brought, or is by a citizen of such state against a citizen of the same and a citizen of another state, it may be so removed, as against said alien or citizen of another state, upon the petition of such defendant, filed at any time before the trial or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy so far as concerns him, without the presence of the other defendants as parties in the cause. But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the state court as against the other defendants. Third. Where a suit is between a citizen of the state in which it is brought and a citizen of another state, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said state court an affidavit stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be

able to obtain justice in such state court. In order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said court good and sufficient surety for his entering in such circuit court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause; or, in said cases where a citizen of the state in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. It shall thereupon be the duty of the state court to accept the surety and to proceed no further in the cause against the petitioner, and any bail that may have been originally taken shall be discharged. When the said copies are entered as aforesaid in the circuit court, the cause shall there proceed in the same manner as if it had been brought there by original process, and the copies of pleadings shall have the same force and effect, in every respect and for every purpose, as the original pleading would have had by the laws and practice of the courts of such state if the cause had remained in the state court."

The first subdivision of this section contains the substance of section 12 of the judiciary act, subdivision 2, the substance of the act of July 27, 1866, and the third subdivison the substance of the act of March 2, 1867. For these two acts see the U. S. Stats. at Large, 306, 558.

The second and third sections of the act of March 3, 1875 (acts of 1875, p. 470), are as follows: "Sec. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be

fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district.

"Sec. 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suits mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make or file a petition in such suit in such state court before or at the term at which said cause could be first tried, and before the trial thereof, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if such bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state; the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may

then, on petition and bond, as heretofore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim, and the trial of issues of fact in the circuit courts shall, in all suits except those of equity and admiralty and maritime jurisdiction, be by jury."

Section 4 provides in substance, that any attachment or sequestration had in the state courts shall continue to hold the goods or estate after the removal, that all bonds and undertakings or security given in the state courts shall remain valid and effectual, and that all injunctions, orders, and other proceedings had prior to removal shall remain in full force until dissolved or modified by the circuit court.

Section 5 provides for remanding causes improperly transferred, and for review in the supreme court of order dismissing or remanding the cause.

Section 7 provides that if the next term of the circuit court to which any cause is removed under the act shall commence within twenty days after the order of transfer is made, the party transferring may have twenty days from the date of the order to file copy of the record and enter appearance in the circuit court. It also provides that a writ *certiorari* may issue to the state court if the clerk refuses to give copy of the record on payment or tender of his fees, etc.[1]

§ 99. **Suits against Aliens under Revised Statutes, Section 639, Subdivision 1.**—The right of an alien defendant, when sued alone, to remove the cause to the circuit court, is unqualified, except as to the amount in controversy, which must exceed five hundred dollars, exclusive of costs. When sued with a citizen of the state where the action is brought, if, so far as it relates to him, the action is brought for the purpose of restraining or enjoining him; or if the controversy, so far as he is concerned, can be finally determined without the presence of the other defendants, and the controversy involves the sum or value of five hundred dollars, he may have it removed.

§ 100. **The Same.**—To authorize a removal under subdivision 1 the petition must show: 1. That the plaintiff, or if more than one, then that all the plaintiffs are citizens of the state in which the action is brought; 2. That all the defendants are citizens of another state. Normal parties, that is, those

[1] See 18 U. S. Stats. at Large, part 3, pp. 470–473.

who are not necessary to a determination of the real controversy, will not prevent a removal.[1] The fraudulent or improper joinder of parties will not prevent a removal.[2] 3. That the sum or value involved in the case exceeds five hundred dollars, exclusive of costs. 4. That the order for removal is applied for by all the defendants. In Davis v. Cook, 9 Nev. 134, it was held that if a suit be brought against several non-resident joint debtors in a state where the statute authorizes the plaintiff to proceed against the defendants served, and if he recover judgment it may be enforced against the joint property of all or the separate property of the defendants served, and the only defendants served are citizens of another state, such defendants are entitled to remove the cause into the circuit court, though the co-defendant not served does not join in the application.[3] Whether after removal, in such a case, the plaintiff is entitled to process to bring in the other defendants seems to be disputed. In Fallis v. McArthur, 1 Bond, 100, it was held that the plaintiff was entitled to such process, while Deady, J., in Field v. Lownsdale, 1 Deady, 288, seems to be of a different opinion. 5. It must be filed at the time the defendant, or defendants, enter their appearance in the state court. As to the meaning of the expression, "at the time of entering his appearance," consult Chatham Nat. Bank v. Merchants' Nat. Bank, 1 Hun, 702; Davis v. Cook, 9 Nev. 134; Webster v. Crothers, 1 Dill. C. C. 301. In California, and most of the "code states," a formal appearance is not necessary. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him.[4]

§ 101. **Removal under Section 639, Subdivision 2.**— Under this subdivision, which is substantially the act of July 27, 1866, 14 Stat. at Large, 306, the right is given to a part of the defendants to remove a cause under the conditions named. The case of aliens under this subdivision, has been already noticed. Aside from aliens, a removal may be had, under this subdivision, when all the following conditions exist: 1. The plaintiff in the suit must be a citizen of the state in which the

[1] Ward v. Arredondo, 1 Paine, 410; Wood v. Davis, 18 How. (U. S.) 467; Mayor etc. v. Cummins, 47 Ga. 321.

[2] See Smith v. Rines, 2 Sumn. 338; Ex parte Girard, 3 Wall. jun. 263. As to improper joinder of causes of action, see Cooke v. State Nat. Bank, 52 N. Y. 96.

[3] See also Merwin v. Wexell, 49 How. Pr. 115.

[4] California Code Civ. Proc., sec. 1014; see Forbes v. Hyde, 31 Cal. 346; Dyer v. North, 44 id. 157; Lyman v. Milton, Id. 631; Lander v. Flemming, 47 Id. 614.

suit is brought; 2. There must be more than one defendant, and one or more of the defendants must be a citizen of the state where the suit is brought, and one or more of them must be a citizen of another state; 3. The amount in controversy must exceed the sum or value of five hundred dollars, exclusive of costs; 4. The suit must, so far as it relates to the non-resident defendant, be for the purpose of restraining or enjoining him, or be one in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause; 5. The party entitled to a removal must apply for it "before the trial or final hearing of the cause" in the state court. Only that part of the case which relates to the non-resident defendant thus applying is removed, leaving the case, as between the plaintiff and the resident defendant, to proceed in the state court. For the construction and the extent to which the act of 1866 will be applied, see Hodgson v. Hayes, 9 Abb. Pr., N. S., 87; Darst v. Bates, 51 Ill. 439; Stewart v. Mordecai, 40 Ga. 1. This act has no application to a case where one of the defendants is an alien, and the other defendants are citizens of another state, and none of the defendants, or none who are served, are citizens of the state in which the suit is brought.[1] Under a joint application by two defendants, the removal may be granted as to one and denied as to the other.[2] Under special circumstances one copartner may remove the cause as to himself under the act of 1866.[3]

§ 102. **Removal under Section 639, Subdivision 3.**—This subdivision, as already stated, is substantially the act of March 2, 1867, known as the "prejudice or local influence act." Like the act of 1866, the primary condition is the existence of a suit in a state court between a citizen of the state in which the suit is brought and a citizen of another state, but unlike that act, the right to remove the cause is given to the plaintiff, as well as the defendant, if an affidavit is made and filed of "prejudice or local influence." The time of making the application is not limited to the time of the "appearance" or answer, but may be made at any time before the trial or final hearing. In Johnson v. Monell, 1 Woolw. 394, Miller, J., says of the act of March 2,

[1] Davis v. Cook, 9 Nev. 134.

[2] Dart v. Walker, 4 Daly (N. Y.), 188.

[3] McGinnity v. White, 3 Dill. C. C. 350. As to the construction of this subdivision in regard to cases where there can be a final determination of the controversy as to the defendant removing the cause, consult Field v. Lownsdale, 1 Deady, 288; Fields v. Lamb, Id. 430; Allen v. Ryerson, 2 Dill. C. C. 501; Bixby v. Couse, 8 Blatchf. 73; Case of Sewing Machine Companies, 18 Wall. 583; S. C., Florence S. M. Co. v. Grover & Baker S. M. Co., 110 Mass. 70.

1867: "For the first time, it allows a plaintiff to remove the suit from the tribunal of his own selection. It also allows this to be done either by plaintiff or defendant, in a certain event, in any stage of the litigation prior to the final hearing or trial. The only conditions necessary to the exercise of the right of removal are: 1. That the controversy shall be between a citizen of the State in which the suit is brought and a citizen of another State; 2. That the matter in dispute shall exceed the sum of five hundred dollars, exclusive of costs; 3. That the party, citizen of such other state, shall file an affidavit stating that he believes, and has reason to believe, that, from prejudice or local influence, he will not be able to obtain justice in the state court; 4. That he give the requisite surety for appearing in the federal court at the proper time, with copies of the papers. Congress intended to give the right in every case where the four requisites we have mentioned exist."

The right of removal under this act is limited to citizens, and does not apply to aliens.[1] The whole suit is to be removed;[2] and all the defendants, not nominal or merely formal parties, must apply.[3] So, as to plaintiffs.[4]

§ 103. **Removals under the Act of March 3, 1875.**—The important parts of this act have been given. For the entire act, see 18 U. S. Stats. at Large, 470. It is not material in this connection to note the first section of the act relating to the original jurisdiction of the circuit court, further than to say it gives jurisdiction in certain cases on the ground of the subject-matter, without regard to the citizenship of the parties, and in other cases because of citizenship without regard to the subject-matter of the suit; and the same distinctive points are carried into the second and third sections in regard to removal of causes; and therefore it may be stated, as a general proposition, that any cause which might, under this act, have been originally brought in the circuit court, may be removed from a state court at the time and in the manner prescribed in the third section. Briefly stated, the conditions of removal are the following: 1. The amount in controversy must exceed five hundred dollars, exclusive of costs; 2. The right of removal is

[1] Crane v. Reeder, 28 Mich. 527; Davis v. Cook, 9 Nev. 134.

[2] Sewing Machine Companies Case, 18 Wall 553; Cooke v. State Nat. B'k, 52 N. Y. 96.

[3] Bixby v. Couse, 8 Blatchf. 73; Cooke v. State Nat. B'k, *supra*.

[4] Case et al. v. Douglas et al., 1 Dillon C. C. 299; 48 Ga. 181; 67 N. C. 391. As to the policy and purpose of the acts of 1866 and 1867, see Crane v. Reeder, *supra*; Galpin v. Critchlow, 112 Mass. 339; Hazard v. Durant, 9 R. I. 602; Fisk v. U. P. R. R. Co., 6 Blatchf. 362.

given to either party, and, under special circumstances, to either one or more of either plaintiffs or defendants, viz.: Where in any suit mentioned in section 2 there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove the cause; 3. As to subject-matter, without regard to citizenship, it gives the right to remove "any suit of a civil nature at law or in equity" involving over five hundred dollars, (1) in cases arising under the constitution, or laws, or treaties of the United States, and (2) cases in which the United States shall be plaintiff or petitioner; 4. As to citizenship, without regard to subject-matter, the right of removal is given, (1) in any suit in which there shall be a controversy between citizens of different states; or, (2) a controversy between citizens of the same state claiming lands under grants of different states; or, (3) a controversy between citizens of a state and foreign states, citizens, or subjects; 5. The removal must be applied for by petition filed in the state court "before or at the term at which the cause could be first tried, and before the trial thereof."

The question as to what are cases "arising under the constitution and laws of the United States," has received judicial construction. In Cohens v. Virginia, 6 Wheat. 379, it is said that "a case may be truly said to arise under the constitution or a law of the United States, whenever its correct decision depends upon a right construction of either."[1] In The Mayor v. Cooper, 6 Wall. 252, Swayne, J., said: "Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient." If the actual controversy involves only questions of common law or of state statutes, though the right or title of one of the parties was originally derived or acquired from or under an act of congress, there being no question raised as to the construction or validity of the act, the case is not removable.[2]

In law cases removed to the federal court, or in purely equity cases, it is not necessary to replead, even for the purpose of

[1] See also Hughes v. Northern P. R'y Co., 1 West Coast Rep. 21; Northern P. R. R. Co. v. Carland, 2 Id. 326; Wallamet Iron Bridge Co. v. Hatch, Id. 230.

[2] See McStay v. Friedman, 92 U. S. (2 Otto), 723; Romie et al. v. Casanova, 91 Id. (1 Otto), 380; Trafton v. Nouges (Sawyer, circuit judge), 13 Pacific Law Rep. 49; S. C., 4 Cent. L. J. 228.

showing jurisdiction, as the order for removal becomes part of the record, and shows how the jurisdiction is acquired. In cases, however, where legal and equitable claims or causes, or causes of action, are joined, as in those states having codes, it is necessary to frame the pleadings anew, making the case one at law or one in equity, or dividing it, and making one a case at law, and the other a suit in equity.[1]

§ 104. **When the Application for Removal must be Made.**—Under subdivision 1 of section 639, the application must be made by the defendant at the time of entering his appearance in the state court. He must act promptly. If he pleads, demurs, or answers, he waives his right.[2] It is too late after reference and continuance.[3] Nor can the state court restore the right of removal by permitting an appearance to be entered *nunc pro tunc*.[4] Under subdivisions 2 and 3 of the same section the petition for removal may be filed "at any time before the trial or final hearing of the suit" in the state court. It is too late to make it after the case has been appealed and is pending in the state appellate court. It must be made before final judgment in the court of original jurisdiction.[5] In Rathbone Oil Co. v. Rauch, 5 West Va. 79, a case was commenced against a citizen of another state, for unlawful detainer, before a justice of the peace; judgment was rendered for the plaintiff, and defendant appealed to the (state) circuit court, and in that court made his application to remove the cause to the federal court under the act of 1867, which was denied. On appeal to the court of appeals the latter court reversed the judgment, holding: first, that no motion to remove could have been made before the justice, that not being a "state court" within the meaning of the act of Congress; second, the case on appeal from the justice is tried *de novo* in the circuit court, the same as if never tried, and hence there was no "final trial" within the intent of the act. It seems now to be generally held that the

[1] See R. S., secs. 639, 914; Thompson v. Railroad Co., 6 Wall. 134; Dart v. McKinney, 9 Blatchf. 359; Green v. Custard, 23 How. (U. S.) 484; Partridge v. Ins. Co., 15 Wall. 573.

[2] Johnson v. Monell, 1 Woolw. 390; West v. Aurora City, 6 Wall. 139; Webster v. Crothers, 1 Dillon C. C. 301; McBratney v. Usher, Id. 367, 369.

[3] Robinson v. Potter, 43 N. H. 188.

[4] Ward v. Arredondo, 1 Paine, 410; Gibson v. Johnson, Pet. C. C. 44.

[5] Stevenson v. Williams, 19 Wall. 572; Vannevar v. Bryant, 21 Id. 41; Fashnacht v. Frank, 23 Id. 416. A hearing on a demurrer to a complaint, and an order overruling the same and allowing the defendant to answer to the merits of the case, is not a "trial" within the meaning of that term as used in section 3 of the act of 1875; such trial, whether it be an issue of fact or law, is one upon which a final disposition of the case is made: Miller v. Tobin, 1 West Coast Rep. 236.

fact of a trial, if the verdict has been wholly set aside and a new trial granted by the court in which the action was brought, or if the judgment of that court has been wholly reversed by the state appellate court and the cause has been remanded for a new trial, does not defeat the right of removal.

§ 105. **When Petition must be Filed.**—The act of 1875 requires the petition for removal to be filed before or at the term at which the cause could be first tried. This is construed to mean the first term at which, under the law and the rules of the court, the cause would be triable, whether from press of business or otherwise it could be reached for trial at that term or not.[2] Whether laches in making up the issues will defeat the right of removal, if removal be applied for before the issues are completed, *quære?*[3]

[1] See Vaunevar v. Bryant, 21 Wall. 41; S. C., Bryant v. Rich, 106 Mass. 180; Kellogg v. Hughes, 3 Dillon, 357; Dart v. McKinney, 9 Blatchf. 359; Fashnacht v. Frank, 23 Wall. 416; Dart v. Walker, 4 Daly (N. Y.), 188; Insurance Co. v. Dunn, 19 Wall. 214. In a very recent case in Colorado, it was decided by Judge Hallett, that when two actions are brought in the state court on the same cause of action, and between the same parties or their successors in interest, the court may require the parties to elect in which they will proceed, or may consolidate them. If the causes are not consolidated, any steps taken in one of them will bind the parties in the other. Consequently, if after the right of removal to the federal court had been established in both suits the parties proceed to trial in the state court in either action, the right to remove the action not tried, under the act of 1875, is waived: Evans v. Smith, 3 West Coast Rep. 213.

[2] See Ames v. Colorado Central R. R. Co., 4 Cent. L. J. 199. A recent case decided by the circuit court of California is important as determining what are "terms" under the present judicial system of that state. An action was commenced in the fourth district court of the state of California, on August 1, 1879: defendant demurred August 22, 1879. The demurrer was overruled. It answered September 12, 1879. Plaintiff demurred to that part of the answer, setting up new matter as a defense, October 2, 1879. The new constitution of California of 1879 having in the mean time taken effect, the case was transferred into the superior court as the successor of the district court, and on January 23, 1880, was assigned to department No. 7 of the superior court. On March 22, 1880, the demurrer to the answer was sustained. An amended answer was filed April 1, 1880, which put the case at issue. The constitution of 1879, and the statutes passed in pursuance thereof, provide that "the superior courts shall always be open (legal holidays and non-judicial days excepted) and they shall hold * * * regular sessions commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof." On January 21, 1884, the defendant filed a petition to remove the case to the United States circuit court, on the ground that the parties were citizens of different states. *Held*, that under the act of congress of 1875, providing that the application for removal must be made "before or at the term at which said cause could be first tried," the application in this case came too late; that the four general sessions of the superior court required to be held are "terms" within the meaning of the act: McNaughton v. S. P. C. R. R. Co., 2 West Coast Rep. 662.

[3] Scott et al. v. Clinton and Springfield R. R. Co., 8 Chicago Legal News, 210; S. C., Scott et al. etc. v. Clinton etc. R. R. Co., 6 Bissell, 529.

§ 106. Entry of Appearance.

Form No. 14.

[TITLE OF STATE COURT AND CAUSE.]

The said defendant, A. B., now comes, and by C. D., his attorney, enters his appearance in said action, and herewith also files his petition for the removal of said cause into the circuit court of the United States, in and for the ..... district of the state of .....

C. D.,
Attorney for Defendant.

§ 107. Petition for Transfer under Section 639, Subdivision 1.

Form No 15.

[TITLE OF STATE COURT AND CAUSE.]

To said superior court:

Your petitioner, C. D., respectfullly shows that he is the defendant in the above-entitled suit; that said suit was brought by said plaintiff, A. B., on or about the ..... day of ....., 18....., in this court; that the said plaintiff at the time of the commencement of said suit was, and still is, a citizen of this state, and your petitioner then was, and still is, a citizen of the state of ....

Your petitioner further represents that said action above entitled was brought by the said plaintiff for the purpose of [here briefly state the nature of and subject-matter of the suit, and the relief asked], and that the matter in dispute in said action exceeds the sum and value of five hundred dollars, exclusive of costs.

Your petitioner further shows that he has herewith filed his appearance in said action, and offers herewith his bond executed by ....., of ....., as surety in the penal sum of two hundred and fifty dollars, conditioned as required by section 639 of the revised statutes of the United States, and that your petitioner desires to remove said cause above entitled into the circuit court of the United States for the district of ....., pursuant to said statute.

Your petitioner, therefore, prays that said bond may be accepted as good and sufficient, according to said statute, and that the said suit may be removed into the next circuit court of the United States in and for said district of ....., pursuant to said statute in such case made and provided, and that no further proceeding be had therein in this court.

And your petitioner will ever pray. .....,
Attorney for Plaintiff.

State of .....,
County of ..... } ss.

C. D., being first duly sworn, says that he is the petitioner above named, that he has read the foregoing petition, and knows the contents thereof, and that each and every of the matters and things therein stated are true.

[JURAT.] [SIGNATURE.][1]

§ 108. The Same—On Ground of Prejudice on Local Influence.

Form No. 16.

[TITLE OF STATE COURT AND CAUSE.]

To said superior court—Your petitioner, A. B., respectfully shows that he is the plaintiff in the above-entitled suit, and that the same was commenced by him on or about the ..... day of ....., 18..., in said superior court, and that your petitioner was at the time said suit was brought, and still is, a citizen of the state of ....., and a resident thereof.

Your petitioner further shows that there is, and was at the time said suit was brought, a controversy therein between your petitioner and the said defendant ....., who is a citizen of the state of ..... and a resident thereof; that said action was brought by your petitioner for the purpose of [here briefly state the nature of the suit and the relief asked], and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioner further represents that said suit has not been tried, but is now pending for trial in this court, and that your petitioner desires to remove the same into the circuit court of the United States for the district of ....., in pursuance of the act of congress in that behalf provided, to wit, the revised statutes of the United States, section 639, subdivision 3.

Your petitioner further says that he has filed the affidavit required by the statute aforesaid in such cases, and offers herewith his bond, executed by ....., of ....., as surety, in the penal sum of two hundred and fifty dollars, conditioned as by said act of congress required.

[Add prayer as in form No. 15.]

....., Attorney for Plaintiff.

[VERIFICATION.]

[1] The statute does not expressly require the petition to be verified, nor that any affidavit should be filed, though the usual practice, and certainly the better practice, is to verify the petition. If the suit is for a money demand, the declaration or complaint of the plaintiff and the statement in the verified petition for removal would be ordinarily sufficient to satisfy the court as to the amount or value in dispute, but where the suit is not upon a money demand, or for damages, the better course would be to present a distinct affidavit of value.

§ 109. **Affidavit of Prejudice or Local Influence to Accompany the Foregoing Petition.**

Form No. 17.

[TITLE OF STATE COURT AND CAUSE.]

State of .... , } ss.
County of ..... }

I, A. B., being duly sworn, say that I am the plaintiff in the above-entitled cause, and that I have reason to believe, and do believe, that from prejudice and local influence I will not be able to obtain justice in said state court

[JURAT.] [SIGNATURE.][1]

§ 110. **Bond to Accompany Last Petition Above.**

Form No. 18.

Know all men by these presents that we,..... as principal, and ..... of ..... as surety, are hereby held and firmly bound unto ..... in the penal sum of ..... dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves jointly and severally firmly by these presents. The condition of this obligation is such that if said ..... shall enter and file, or cause to be entered and filed, in the circuit court of the United States in and for the ..... district of ..... on the first day of its session next to be held, copies of all process, pleadings, depositions, testimony and other proceedings in a certain suit or action now pending in the superior court of the county of....., state of ....., in which ..... is plaintiff and ..... is defendant; and shall do such other appropriate acts as, by the act of congress, in that behalf are required to be done upon the removal of such suit from said state court into the said United States court, then this obligation shall be void, otherwise of force.

Dated this ..... day of ....., 18.....

State of ....., } ss.
County of ..... }

I, ..., of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the state of ....., and a property-holder therein, that I am worth the sum of five hundred dollars, over and above all my debts and liabilities, and exclusive of property by law

[1] The above form of petition and affidavit are from "Dillon on the Removal of Causes," pp. 81, 82, under subdivision 3 of section 639, and may be readily changed to apply to the case of a defendant applying on the same ground.

exempt from execution; and that I have property in the state of ....., liable to execution, of the value of more than five hundred dollars.

[JURAT.] [SIGNATURE.][1]

§ 111. Petition for Removal under Act of March 3, 1875, on the Ground of Citizenship, where all the Opposing Parties are Citizens of Different States, and all the Plaintiffs or all the defendants Unite in the Petition.

Form No. 19.

[TITLE OF STATE COURT AND CAUSE.]

To said Court: Your petitioners, A. B., C. D., and E. F., respectfully show to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars:

That the controversy in said suit is between citizens of different states; that, at the time of the commencement of this suit, the said A. B., one of your petitioners, was, and still is, a citizen of the state of ....; that said C. D. was then, and still is, a citizen of the state of ..... [Here give, in the same manner, the citizenship of each of the several plaintiffs and defendants.]*

And your petitioners offer herewith a bond, with good and sufficient surety, for their entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for the payment of all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And you petitioners pray this honorable court to proceed no further in said cause, except to make the order of removal now prayed for and required by law, and to accept the said surety and bond, and to cause the record herein to be removed into the said circuit court of the United States in and for the district of....., and your petitioners will ever pray.

.....

[VERIFICATION.] Attorney for Petitioners.

§ 112. **The Same.**—If the application is made under the latter clause of section 2, act of 1875, and all the plaintiffs, or all the defendants, as the case may be, do not join in the peti-

[1] The above form of bond is applicable to removals under subdivision 1 of sec. 639, as well as under subdivision 3. If the bond is given under subdivision 2, the condition should be to enter and file, etc., "copies of all process, pleadings, depositions, testimony, and other proceedings, so far as the same concern or affect the petitioner, in a certain suit," etc. Such bond must be signed by the principal: Rough v. Booth, 2 West Coast Rep. 72.

tion for removal, follow the preceding form down to the star (*), changing the plural to the singular if required, and then insert: "Your petitioner states that, in the said suit above mentioned, there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between the said petitioner and the said ..... and the said ..... [naming the parties actually interested in said controversy]." If the pleadings in the case do not sufficiently show the nature of the controversy to be one within the latter clause of section 2, an explicit statement showing that fact should be added to the above allegations, and then proceed as in the above form.

Where the ground of removal is that the suit is one "arising under the constitution and laws of the United States, or treaties made under their authority," follow the above form down to the star (*), and then insert the following: "Your petitioner further shows that said suit is one arising under the laws [or constitution, or treaties as the case may be] of the United States, in this: [Here state the facts showing that a federal question necessary to a proper decision of the case is involved], after which follow above form to the conclusion. In this case the citizenship of the parties is not necessary to be stated, but such statement can do no harm; and if it constitutes an additional ground for removal, it may be also relied upon.

The petition for a removal on the ground that the parties are citizens of different states, must show that such ground of removal existed both at the time of the commencement of the action and at the time of the application for removal. A petition which only alleges that the defendant is, and always has been, a citizen of California, and that the plaintiff is a citizen of Missouri, is insufficient. The citizenship of the parties, under such circumstances, is a judicial fact, and must be alleged in the petition. If such allegations are not made, whether the petition may be amended in the circuit court so as to show them, *quære*. If the power to allow such amendments be conceded, it is not a matter which the party removing can demand as a legal right, but only a matter for the exercise of a sound discretion by the court. Such an amendment should not be allowed where, after an amendment of the petition in the circuit court, the record in each court would show upon its face jurisdiction which would authorize it to proceed to final judgment.[1]

[1] McNaughton v. S. P. C. R. R. Co., 2 West Coast Rep. 662.

§ 113. Bond to Accompany the Preceding Petition.

Form No 20.

[Follow No. 18 down to the beginning of the condition, then proceed as follows:]

This obligation is upon the following conditions: The said ..... having petitioned the ..... court of the county of ..... of the State of ....., for the removal of a certain cause therein pending, wherein ..... is plaintiff, and ..... is defendant, to the circuit court of the United States in and for the district of .....

Now if the said ....., your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall pay or cause to be paid all costs that may be adjudged against him by said circuit court, if said court shall determine that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force.

Witness our hands and seals this ..... day of ....., 18...

[JUSTIFICATION OF SURETIES.] [SIGNATURES AND SEALS.]

§ 114. **The Same—Form of Bond.**—In any case where special bail was required of the defendant in the cause originally, insert in the condition of the bond, "and shall then and there appear and enter special bail in said action." The sum to be inserted as the penalty of the bond is not prescribed. The amount should be fixed with reference to the circumstances of the case, and the acts and duties of the petitioners in each special case. It is essential that the bond be several, not merely joint.[1] It is not essential that the petitioner should be one of the obligors in the bond.[2] The bond need not be conditioned for the appearance of other defendants who had not been served with process, and who do not unite in the application.[3]

§ 115. **The Same—Offer and Service of Bond.**—A sufficient bond must be offered at the time pointed out in the act, and can not be afterwards amended in substance.[4]

§ 116. Notice of Motion for Removal.

Form No. 21.

[TITLE OF STATE COURT AND CAUSE.]

To ....., plaintiff's attorney:

Take notice, that upon the petition and appearance of the defendant, of which a copy is hereto annexed, and which were

[1] Roberts v. Carrington, 2 Hall, 694.
[2] Vandevoort v. Palmer, 4 Duer, 677; but see Rough v. Booth, 2 West Coast Rep. 72.
[3] Suydam v. Smith, 1 Den. 263; Vandevoort v. Palmer, 4 Duer, 677.
[4] Roberts v. Carrington, 2 Hall, 694.

on, etc. [or upon the petition, a copy of which is hereto annexed, and which, together with the petitioner's appearance herein already served on you, was, on, etc.], filed in this court, and upon the bond of the petitioner and his sureties [or the bond on behalf of the petitioner], a copy of which is also annexed, defendant will, on....., at....., at the hour of....., move the court that said cause be removed from this court to the circuit court of the United States for the district of.....

[DATE.] [SIGNATURE.][1]

§ 117. Order to Show Cause.

Form No. 22.

[TITLE OF STATE COURT AND CAUSE.]

To....., plaintiff's attorney:

The defendant having this day entered an appearance in this cause, and at the same time filed a petition praying for the removal of this action to the circuit court of the United States for the district of California, pursuant to the act of congress of the United States in such case made and provided, and offered the surety as therein provided by a bond now filed, it is ordered that the plaintiff show cause on....., the.....day of ..... next, before this court, at the opening of court on that day, or as soon thereafter as practicable, why the prayer of said petition should not be granted, and in the mean time and until the hearing of said petition, let all proceedings on the part of the plaintiff herein be stayed. E. D.,

[DATE.] District Judge.

§ 118. Order for Removal of Cause to United States Court.

Form No. 23.

[TITLE.]

Upon reading and filing the petition of ...., the defendant in the above-entitled action, and upon filing the bond, and good and sufficient sureties having been offered by the said defendant in the premises, and the same being by me, the judge of said superior court, duly accepted, it is hereby ordered that no further proceedings be had in this cause, and the removal of the same to the circuit court of the United States for the district of California, to be held in and for the.....district of Cali-

[1] The plaintiffs may oppose the motion upon the moving papers, or with new affidavits also, but after the order granting the petition has been made the jurisdiction of the state court is gone, and that court has no power to vacate its order; Livermore v. Jenks, 11 How. Pr. 479. The application should be on notice, or an order to show cause: Disbrow v. Driggs, 8 Abb. Pr. 305, n. But compare Illius v. New York and New Haven R. R. Co., 13 N. Y. 597, where an order was made *ex parte*.

fornia, be, and the same is hereby, allowed and ordered, in accordance with the aforesaid petition and the statute of the United States in such case made and provided.

[DATE.] [SIGNATURE.]

§ 119. **Effect of Removal on Injunction.**—Neither an outstanding injunction, nor a motion for an attachment for its violation, prevents the removal of the cause.[1] Injunctions, orders and other proceedings granted in the state court prior to removal are expressly continued in force by section 4 of the act of March 3, 1885 (18 U. S. Stat. at Large, 471), where the motion to dissolve an injunction in the federal court is made upon the same papers upon which the writ was granted in the state court, it is in effect an application for reargument, and leave to to make such motion should be first applied for and obtained before it can be made.[2]

§ 120. **Mandamus to Compel Trial after Removal.**—The supreme court of California has no jurisdiction to grant a writ of mandate to compel the judge of a district court to proceed with the trial of an action commenced therein, in which an order has been made by said district court directing the cause to be transferred to the circuit court of the United States for trial, for the alleged reason that the parties thereto are citizens of different states, the subject-matter being in the jurisdiction of the said district court.[3]

§ 121. **Removal Refused.**—A suit in equity to enjoin a suit at law is in reality an equitable defense, and its removal may be refused.[4] A summons to show cause why a debtor not served in the original action should not be bound by the judgment is regarded as a further proceeding rather than a new action, and a removal can not be granted unless the plaintiff is an alien, or all of the several defendants are citizens of another state from the plaintiff.[5]

§ 122. **Surety Approved.**—It is proper that the order should declare the surety approved.[6]

§ 123. **Writ of Certiorari under Section 7, of the Act of March 3, 1875.**

Form No. 24.

The president of the United States of America to the judge of the superior court of the county of ....., in and for the state of California:

[1] Byam v. Stevens, 4 Edw. Ch. 119; [2] Carrington v. Florida R. R. Co., 9 Blatchf. 468. [3] Francisco v. Manhattan Ins. Co., 36 Cal. 283. [4] Rogers v. Rogers, 1 Paige, 188. [5] Fairchild v. Durand, 8 Abb. Pr. 305; see Brightley's Digest, 12. [6] Vandevoort v. Palmer, 4 Duer, 677.

Whereas it hath been represented to the circuit court of the United States for the district of ....., that a certain suit was commenced in the [here name the state court] wherein ....., a citizen of the state of ....., was plaintiff, and ....., a citizen of the state of ....., was defendant, and that the said ..... duly filed in the said state court his petition for the removal of said cause into the said circuit court of the United States, and filed with said petition the bond with surety required by the act of congress of March 3, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," and that the clerk of the said state court above named has refused to the said petitioner for the removal of said cause a copy of the record therein, though his legal fees therefor were tendered by the said petitioner;

You, therefore, are hereby commanded that you forthwith certify, or cause to be certified, to the said circuit court of the United States for the district of ....., a full, true, and complete copy of the record and proceedings in the said cause, in which the said petition for removal was filed as aforesaid, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ; so that the said circuit court may be able to proceed thereon, and do what shall appear to them of right ought to be done. Herein fail not.

Witness the Honorable Morrison R. Waite, chief justice of the supreme court, and the seal of said circuit court hereto affixed, this, the ..... day of ....., A. D. 18...

....., ...,

[SEAL.] Clerk of said Circuit Court.[1]

[1] *Writ.*—"The writ of *certiorari* should be addressed to the judge or judges of the state court, but a return to the writ duly certified may be made, it is supposed, by the clerk of the state court:" Dillon on Removal of Causes, 88; citing Stewart v. Ingle, 9 Wheat. 526.

CHAPTER IV.

PARTIES TO CIVIL ACTIONS.

§ 124. **Who are Parties, Generally.**—The persons by whom, and the persons against whom actions are instituted, are the parties to the actions. In courts of original jurisdiction, the former are called plaintiffs, and the latter defendants. In appellate courts they are known as appellant and appellee or respondent; in courts of error, as plaintiff in error, and defendant in error. The term "parties," when used in connection with the subject-matter of the issue, is understood to include all who are directly interested, and who, therefore, have a right to make a defense, control the proceedings, or appeal from the judgment. Persons not having these rights are regarded as strangers to the action.[1]

§ 125. **In Legal Actions.**—So far as this general statement is concerned, it applies equally to actions under the common-law system and to actions under a code; but the mode by which the interest which makes one a proper or necessary party is determined is very different. In an action at law, under the old system, the plaintiff must be a person in whom is vested the whole legal right or title; and if there were more than one, they must all be equally entitled to the recovery; that is, the right must dwell in them all as a unit, and the judgment must be in their favor equally, and the defendants must be equally subject to the common liability, and judgment must be rendered against them all in a body. The necessity of joining all as plaintiffs in whom was vested the whole legal title, was imperative; but in certain cases the plaintiff had the right to elect whether he would sue all who were liable; but wherever judgment passed against two or more defendants, it was necessarily joint.

§ 126. **In Equitable Actions.**—The suit in equity, however, was hampered by no such arbitrary requirements. Its form was controlled by two general and natural principles: 1. That it should be prosecuted by the party beneficially interested, instead of the party who had the apparent legal right and with him might be joined all others who had an interest in the subject-matter, and in obtaining the relief demanded; and 2. That all persons, whose presence was necessary to a complete determina-

[1] Van Camp v. Commissioners etc., 2 West Coast Rep. 18.

tion and settlement of the questions involved, should be parties plaintiff or defendant, so that all their rights and interests, whether joint or several, or however varied as to importance or extent, might be determined and adjusted by the court. It was not necessary that the decree should pass in favor of all the plaintiffs for the same right or interest, nor against all the defendants, enforcing the same obligation. Relief could be granted the defendant, or one of several defendants, against the plaintiffs, or against the other defendants.

§ 127. **Equitable Doctrines Adopted by Codes.**—The codes of procedure of the different states, while differing somewhat in the details of their provisions, agree substantially in adopting the rules observed by courts of equity in regard to parties in the two features above named.[1]

§ 128. **Cause of Action, Meaning of.**—In every case there must be a "cause of action;" that is, a right on the part of one person, the plaintiff, combined with a violation or infringement of that right by another person, the defendant. The expression "cause of action" includes in its meaning all the facts which together constitute the action, and therefore we can not conceive of a cause of action apart from the person who alone has the right to maintain it.[2]

§ 129. The right which is violated or is infringed may be one which is created by a contract or agreement, express or implied, or it may be a natural right, or one which exists in favor

[1] Pomeroy's Remedies and Remedial Rights, secs. 196–200.

[2] In analyzing the expression "cause of action," as used in the code, Mr. Pomeroy says: "Every action is brought in order to obtain some particular result which we call the remedy, which the code calls the 'relief,' and which, when granted, is summed up or embodied in the judgment of the court. This result is not the 'cause of action' as that term is used in the codes. It is true this final result, or rather the desire of obtaining it, is the primary motive which acts upon the will of the plaintiff, and impels him to commence the proceeding, and in the metaphysical sense it can properly be called the cause of this action; but it is certainly not so in the legal sense of the phrase. This final result is the 'object of the action,' as that term is frequently used in the codes and in modern legal terminology. It was shown * * * that every remedial right arises out of an antecedent primary right and corresponding duty, and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant, which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant, springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several states:" Remedies, etc., sec. 453.

of the plaintiff as against every other person independently of any contract or agreement; and hence, though codes prescribe but one form of action, yet the right which underlies and forms the basis of the cause of action, naturally divides civil actions into two primary classes or divisions, viz.: actions *ex contractu*, for the violation of contract rights, and actions *ex delicto*, for the violation of natural rights.

Thus in the case of a written contract, wherein A. agrees to sell and deliver certain goods to B., and B. agrees to pay A. a certain price, at a time named, therefor, a relation is established at once between the parties, and the contract itself discloses, in the light of the facts constituting the breach, who the party is who is entitled to maintain an action therefor, and against whom it must be brought. The right, as well as the liability, is fixed by the contract, and can not exist independently of it. But in case of a tort, as if A. wrongfully imprisons B., the right of B. to his personal liberty exists against all the world; but the right having been violated only by A., he alone is liable to an action therefor. This right of personal liberty is absolute; it constantly exists, and does not depend upon any contract or other relation of the parties formed by themselves, while in the other case the right is created by the parties, and can not exist without it. Upon this difference depends the distinction between actions on contract and actions for tort.

This difference also lies at the foundation of the rule that, independently of a statute authorizing it, a right of action for a tort could not be assigned; whilst a contract, or right based upon a contract, could, at least so far as to vest the beneficial interest in the assignee, it being considered that a natural right, one which the party could not create, he could not transfer. It is not our purpose, however, to discuss in this connection the several kinds of contracts classed as negotiable and non-negotiable, nor the different kinds of torts as affecting the person or property, and the distinction to be taken between them.

CHAPTER V.

PARTIES PLAINTIFF—REAL PARTY IN INTEREST.

§ 130. **Provision of Codes.**—All the states having a well-defined code of practice or civil procedure, except Georgia, have adopted the same general rule as to parties plaintiffs, viz.: "Every action must be prosecuted in the name of the real party in interest." To this general rule each code names certain exceptions, which will be hereafter noticed. This general rule applies to all actions, whether founded upon a tort or upon a contract.[1]

§ 131. **Who is Real Party in Interest.**—Where codes do not prevail, actions upon contracts must be brought in the name of the party in whom the legal interest is vested, or whose legal interest has been injuriously affected; and the legal interest was held to be vested in him to whom the promise was made, and from whom the consideration passed. Thus, in an action for breach of contract, where no other person has acquired an interest in the matter in dispute, only the parties to the contract sued on should be made parties to the suit.[2]

But the party in whom the legal interest is vested is not always the real party in interest. "The real party in interest" is the party who would be benefited or injured by the judgment in the cause. The interest which warrants making a person a party is not an interest in the question involved merely, but some interest in the subject-matter of litigation.[3] The rule should be restricted to parties whose interests are in issue, and are to be affected by the decree.[4] The interest of the plaintiff must be connected with the subject-matter of the action upon which the defendant is liable, though it is not necessary that he should be connected to it by a legal title. Hence, in actions

[1] As to the effect of this provision of the code in authorizing suits by an assignee, and on the assignability of causes of action, see *post*, subdivision first of Forms of Complaints, chapter L, Actions by Assignee. In New York, Indiana, Kansas, Missouri, Wisconsin, Florida, South Carolina, Kentucky, Oregon, Nevada, Dakota, North Carolina, Washington, and Montana the further provision is added: "But this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract."

[2] Barber v. Cazalis, 30 Cal. 92.

[3] Vallette v. Whitewater Valley Canal Co., 4 McLean, 192; 5 West. Law Jour. 80; see Kerr v. Watts, 6 Wheat. 550.

[4] Mechanics' Bank of Alexandria v. Seton, 1 Pet. 299; Elmendorf v. Taylor, 10 Wheat. 152; Story v. Livingston Ex'x, etc., 13 Pet. 359; United States v. Parrott, 1 McAll. 271.

ex contractu, the parties must stand related to the contract which forms the basis of the action.

Even equity will not make a defendant liable, upon a contract, to a plaintiff who is neither a party to the contract, nor the legal or equitable owner of the contract right to the subject-matter of the suit, nor the legal representative of such owner. For example: A. contracts with B. to sell and deliver to him certain goods. B. sells the same goods to C. and agrees to deliver them to him in the same manner he would if the goods were already in his possession. A. fails to deliver them to B., and B. therefore cannot deliver them to C. In such case C. can not maintain an action against A. for the non-delivery of the goods, notwithstanding B. would have delivered to C. if he had received them; there being no privity between C. and A., that is, C. is in no way related to the contract by which A. had agreed to deliver them; but it would be otherwise if B. had assigned his contract with A. to C. Nor would it, in the case above supposed, be any defense to an action brought by B. against A. for non-delivery, that B. had resold the goods to C., and that C. did not intend to sue B. for the non-delivery: Gunter v. Sanchez, 1 Cal. 50. It is perfectly apparent that these two executory contracts created no relation between A. and C., nor between C. and the property, for the property never passed from A. because of the non-delivery.

If, however, the contract between A. and B. had vested the property in B., and by the second contract the same property became vested in C., the latter might maintain an action against A. concerning it; or, if the goods after the sale to B. had remained in A.'s hands as bailee, he would be liable to an action by C. for the non-delivery of the goods; but in that case the bailment, though it may have been created by the terms of the contract between A. and B., is in fact a separate contract from the sale, and imposes the duty upon A. of delivering the goods to whomsoever may be the owner at the time they are demanded, and this duty is the synonym of an implied contract to deliver them to C., he having become the owner; and this implied contract must be the basis of the action brought by C. In such action, it is true, it may be necessary to prove both contracts, because in the case supposed these contracts show the facts from which the implied contract arises, viz.: the bailment and the ownership.

§ 132. **When Promise is for Benefit of Third Person.** In regard to actions upon promises made for the benefit of

third persons, there has been much conflict in the decisions of the courts of the different states, especially among those which retain the common-law system of procedure as to the right of such third person to maintain an action against the promisor. In a majority of such latter states, however, the doctrine is now settled that such right of action exists. Thus in a recent case in New Jersey the court said: "The doctrine is well settled in this state that if, by a contract not under seal, one person makes a promise to another for the benefit of a third, the third may maintain an action on it, though the consideration did not move from him."[1]

The action of *assumpsit*, at common law, could not be maintained upon such promise, unless upon the theory that there was an implied promise to the creditor, for in that form of action the plaintiff is obliged to aver a promise to himself; and if such promise may be implied, there is no reason for confining the right of action to any class of cases where a consideration sufficient to support any contract between strangers has passed to the party making the promise. If, however, the action is brought in "case" instead of *assumpsit*, there would be good grounds for the distinction.

Under the code, which not only abolishes the distinctions between actions at law and suits in equity, but requires that every action shall be brought in the name of the real party in interest, there would seem to be little doubt of the right of the party for whose benefit the promise was made to maintain the

[1] Price v. Trosdell, 1 Stew. 200. The case to which the court referred as settling that doctrine in that state was Joslin v. The N. J. Car Spring Co., 7 Vroom, 141. The facts in the latter case (which was an action at law) were, that the plaintiff was employed as foreman by Fields & King, manufacturers, at a salary of two thousand dollars a year from February 1, 1870, to October 31, 1871, at which last date the defendants bought Fields & King's stock and assets, assumed their liabilities, and carried on their business. The plaintiff assented to this transfer of liability, and continued to act as foreman up to January, 1872, when he was discharged. This action was brought to recover from the defendants his salary from February 1, 1870, to January, 1872. The jury returned a verdict in his favor, and on a rule to show cause why the verdict should not be set aside, it was held that he was entitled to recover his salary for the whole period. The court said: "It is stated in some of the authorities cited, as a result of a review of cases, that this is now well settled as a general rule. It must be borne in mind, however, that this case falls within a special class of cases where the party who makes the promise has received from the party to whom the promise is made, money or property, from or out of which he is to pay creditors of the second party: See Mellen, Adm'x. v. Whipple, 1 Gray (Mass.), 317; and in this class of cases the right of the creditor, the party for whose benefit the promise was made, to recover, is, we think, sustained by the weight of authority." See also Seaman v. Waitney, 35 Am. Dec. 618; Burrows v. Turner, Id. 622; Barker v. Bucklin, 43 Id. 726, and cases cited in notes thereto.

action, although such promise is contained in a writing under seal. Nor does this conflict with the rule above laid down, that "the plaintiff must stand related to the contract, for the test is not the legal but the equitable title, right, or interest, and that interest is directly created by the contract."[1]

CHAPTER VI.

PARTIES PLAINTIFF—ACTIONS FOUNDED ON CONTRACT.

§ 133. **How Plaintiff's Relation to the Contract may Arise.**—The relation to the contract necessary to enable one to maintain an action upon it may be created in many different ways: 1. By the contract itself, as in the case of the original parties to the contract; 2. By transfer or assignment; 3. By operation of law, as in the case of executors or administrators of a deceased party to, or assignee of, a contract; 4. By aid of the law, as in case of attachment or garnishment of debts due, or property in possession; but in most states this is a special proceeding in aid of an action pending; or for the enforcement of a judgment rendered. While in some states, as in Michigan, although a suit must first be commenced against the principal defendant before a writ of garnishment can be obtained against one indebted to him, yet the affidavit for the writ and the answer of the garnishee form an issue between them, and the case is docketed and tried as an independent suit, and a judgment is rendered therein for or against the garnishee, as in other actions, but as the garnishee of the principal debtor. Although the plaintiff in this proceeding is subrogated by force of the statute to the rights of the defendant in the principal case, yet it is more analogous to process of attachment against the principal debtor's property, by which a lien is secured upon it in advance of the judgment, since judgment can not be obtained against the garnishee until the plaintiff has obtained judgment against the principal defendant, and the moneys obtained by the proceeding must be applied to the satisfaction of the principal judgment, and does not otherwise become the property of the plaintiff.

§ 134. **Joinder of Plaintiffs Generally.**—The provisions of the code in respect to the joinder of parties plaintiff are bor-

[1] Wiggins v. McDonald, 18 Cal. 126; Pomeroy's Remedies, sec. 139 et seq., where this subject is discussed at length.

rowed from the former equity practice, and are as follows: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided."[1] And "of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff can not be obtained, he may be made a defendant, the reason thereof being stated in the complaint," (or petition).[2] These sections, as well as the one which provides that all actions shall be prosecuted in the name of the real party in interest, have many exceptions, which will be hereafter noticed.

The defendant in an action who has made but one contract or incurred a single liability, obviously has the right to require that the whole case be disposed of in one action. There may be cases of a contract made with two or more persons of such nature that a particular breach by the one party may injure but one of several persons who form the other party to the contract; and in such case only the person who has sustained damages, and who would be entitled to receive compensation for the breach, need sue; but wherever the damages are sustained by all of several constituting one of the parties to the contract, all must join as plaintiffs, unless the contract itself severs the interest of each from the other, or unless the amount to which each is entitled has been determined by the mutual agreement of both parties to the contract, which of course would amount to a several liquidation, and would enable each party to sue separately for his share; the contract and the breach in such case being only matter of inducement.

"A contract by one person with two jointly does not comprehend or involve a contract with either of them separately, as is evident from the well-known doctrine that a covenant or promise to two, if proved in an action brought by one of

[1] Arizona, sec. 12; California, sec. 378; New York (1876), sec. 446; Ohio, sec. 34; Indiana, sec. 70; Kentucky, sec. 22; Arkansas, sec. 4475; Missouri, sec. 4; Iowa, sec. 2515; Wisconsin, c. 122, sec. 18; Kansas, sec. 35; Nebraska, sec. 37; Nevada, sec. 12; Oregon, sec. 380 (limited to equitable actions); North Carolina, sec. 60; South Carolina, sec. 140; Florida, sec. 68; Colorado, sec. 11; Montana, sec. 12; Wyoming, sec. 40; Dakota, 70; Washington, sec. 8.

[2] New York, sec. 119; Indiana, sec. 19; California, sec. 382; Wisconsin, c. 122, sec. 20; Florida, sec. 70; South Carolina, sec. 142; Dakota, sec. 72; Oregon, sec. 381; Nevada, sec. 14; Ohio, sec. 36; Kansas, sec. 37; Iowa, sec. 2548; Nebraska, sec. 39; Kentucky, sec. 36; Missouri, sec. 6; North Carolina, sec. 62; Idaho, sec. 14; Washington, sec. 8; Montana, sec. 14; Arizona, sec. 14; Wyoming, sec. 42; Colorado, sec. —.

them, sustains a plea which denies the existence of the contract."[1]

§ 135. **Plaintiffs must Represent Entire Cause of Action.**—The question as to the joinder of parties being one of the principal grounds of demurrer, is one of great importance and frequent adjudication. It follows from the statement that the plaintiff or plaintiffs must represent the entire cause of action (that is, that the cause of action can not be divided), that all who are interested in the cause of action and in obtaining the relief sought, must be joined as plaintiffs. We use the words "represent" and "interested" in the sense used in the codes. The person or persons who "represent" the entire cause of action must be "the real party in interest."

§ 136. **Refusal of Plaintiffs to Join.**—Exceptions to the foregoing general rule existed at common law, and are provided for in the codes. The death of one of the persons thus interested, or his refusal to join, have been held sufficient reasons for the failure to make such person a co-plaintiff, the reason appearing in the complaint, and, in case of refusal to join, he should be made a defendant.[2]

But in such case the recovery must be entire, and for the whole interest, so that the defendant, against whom the recovery is had may not be subjected to a second action; while those jointly entitled to the recovery, though one of them is a defendant, being both before the court, may have their mutual rights and interests adjusted in the same decree of judgment; or if from a complication of accounts, as between partners, that is inconvenient, the recovery must enter into the accounting between them. The person thus made a defendant is equally with the plaintiff bound by the judgment or decree.

§ 137. **Where Parties are Numerous.**—In equity, the rule that all persons materially interested must be made parties was always dispensed with where it was impracticable, or very inconvenient, as in the case of a very numerous association in a stock concern, in effect a partnership.[3] This same rule is embodied in the code, which provides that where the parties are numerous, and it is impracticable to bring them all before the court, or where the question is one of common or general interest, one or more may sue or defend for the benefit of all.

[1] Wetherell v. Langston, 1 Ex. 644.

[2] See California Code of Civil Procedure, sec. 382, and Nightingale v. Scannell, 6 Cal. 509, and S. C., 18 Id. 322; Hays v. Lasater et al., 3 Ark. 565; Moody v. Sewall, 14 Me. 295, *ante*, sec. 134, n.

[3] Cockburn v. Thompson, 16 Ves. 321; Story's Eq. Pl., sec. 135; Gorman v. Russell, 14 Cal. 540.

It would be very difficult to lay down any positive rule by which the degree of the inconvenience which would justify the omission could be absolutely determined. Other circumstances aside from the numbers must often enter into a proper determination. The exigencies of the case, the necessity for prompt action, the hazards, or inevitable loss from delay, might justify the omission in one case, while in another all the defendants, though equally numerous, should be brought in. The facts relied upon to justify the omission should be clearly stated in the complaint, and become a matter for judicial decision, governed by the spirit of the code and the facts of the particular case.[1]

§ 138. **Common Interest, What is.**—The test of the unity of interest referred to in this section is that joint connection with, or relation to, the subject-matter which, by the rules of the common law, will preclude a separate action. It refers to such cases as joint tenants, co-trustees, partners, joint owners, or joint contractors simply.[2] In all these cases the right, to assert or protect which the suit is brought, is one which exists against them all, or the obligation to be enforced is common to them all; then, if it is impracticable to bring them all before the court, one may sue or defend for all.[3] The rule which permits the omission of parties, and the filing of a bill by one in behalf of all the others, is founded on necessity, and is established to prevent a failure of justice which could not be otherwise avoided.[4]

§ 139. **Actions by Joint Tenants and Tenants in Common.**—The code of California, following in this respect the majority of the codes of the various states, provides that "all persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.[5] It is also provided that "any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, copar-

[1] In Andrews v. Mokelumne Hill Co., 7 Cal. 333, it was held that section 14 in the former practice act was intended to apply to suits in equity, and not to actions at law. Subsequent decisions of this court abolished all distinctions between the actions at law and suits in equity in this respect.

[2] Jones v. Felch, 3 Bosw. 63; Buckham v. Brett, 35 Barb. 596; Gibbons v. Peralta, 21 Cal. 632, 633.

[3] Reid v. The Evergreens, 21 How. (N. Y.) 319.

[4] Bouton v. City of Brooklyn, 15 Barb. 375; Smith v. Lockwood, 13 Id. 209; Towner v. Tooley, 38 Id. 598.

[5] California Code C. P., sec. 384.

ceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or declaring the same to be held in trust, or of removing a cloud upon the same."[1]

At the common law, joint tenants were required to join in an action of ejectment, and the failure to do so was fatal to a recovery.[2] While two or more co-tenants could not join in an action of ejectment, the interest of each being separate and distinct.[3] But under this provision the right of one tenant in common to recover in an action of ejectment the possession of the entire tract as against all persons but his co-tenants, has been repeatedly upheld.[4] Or he may sue alone for his moiety;[5] or may in equity obtain a partition.[6] And these rules apply equally to the grantee of the tenant in common.[7] So, also, executors and administrators can maintain such action jointly with the other tenants in common in all cases where their testators or intestates could have done so, until the administration of the estates they represent have closed, or the property distributed under the decree of the probate court.[8] But if an estate should be sold in lots to different purchasers, they could not join in exhibiting one bill against the vendor for specific performance; but where there was a contract to convey with but one person, under which the purchaser conveyed his equitable interest of a moiety to each one of two persons, it was held that these two persons might sue the original vendor for specific performance.[9] And where one tenant in common sells the right to a stranger to cut timber off the common property, another tenant in common of the same property can not maintain replevin for the timber after it is cut.[10] After severance of a fund held in common, each party may maintain a separate action for his ascertained share.[11]

[1] California Code C. P., sec. 381, effect July 1, 1874; see, also, secs. 384, 738, and 1452.

[2] Dewey v. Lambier, 7 Cal. 347.

[3] De Johnson v. Sepulbeda, 5 Cal. 149; Throckmorton v. Burr, Id. 401; Welch v. Sullivan, 8 Id. 187.

[4] Touchard v. Crow, 20 Cal. 150; Stark v. Barrett, 15 Id. 371; Mahoney v. Van Winkle, 21 Id. 583; Galler v. Fett, 30 Id. 484; Weise v. Barker, 2 West Coast Rep. 108.

[5] Covilland v. Tanner, 7 Cal. 38; Collier v. Corbett, 15 Id. 183.

[6] Tinney v. Stebbins, 28 Barb. 290; Tripp v. Riley, 15 Id. 333; Bebee v. Griffing, 4 Kern. 235.

[7] Stark v. Barrett, 15 Cal. 361, approved in Touchard v. Crow, 21 Id. 162; Hart v. Robertson, Id. 348; Mahoney v. Van Winkle, Id. 583; Reed v. Spicer, 27 Id. 64; Carpenter v. Webster, Id. 560; Seward v. Malotte, 15 Id. 304.

[8] Reynolds v. Hosmer, 45 Cal. 631.

[9] Owen v. Frink, 24 Cal. 177.

[10] Alford v. Dradeen, 1 Nev. 228.

[11] Gen. Mut. Ins. Co. v. Benson, 5 Duer, 168.

§ 140. **Actions by Joint Owners of Chattels.**—Both at the common law and under the code a co-owner of a chattel can maintain no action to enforce his proprietary rights therein without joining his co-owners. Thus one co-owner can not recover possession of the common property from his co-owner who is in the exclusive possession thereof, in an action in the nature of replevin.[1] Thus tenants in common of wool, who became such by one of them letting sheep for a year to the other, with an agreement that the latter was to take care of the sheep, shear them, sack the wool, and deliver it to the owner of the sheep at S., a port, to be by him shipped to a commission merchant at S. F., to be sold, and that when the wool was sold the proceeds were to be equally divided, can not maintain replevin against each other, nor can one against the vendee of the other;[2] and the same necessity exists for the joinder of all the co-tenants in an action to recover for the conversion by a stranger.[3] So also tenants in common must join in an action for an entire injury done to the partnership property, either in tort, or *assumpsit* when tort is waived.[4] Joint owners or joint charterers of ships are tenants in common, and must all join in an action affecting the common property, or for the recovery of freight.[5]

§ 141. **Actions by Executors and Administrators.**—The provision that every action must be prosecuted in the name of the real party in interest has certain exceptions. Thus the code provides that "an executor, administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."[6]

In the case of executors, it was formerly the rule that where several were named, all must join in an action, even though some renounce.[7] By section 1355, California Code, only those

[1] Cross v. Hulett, 53 Mo. 397; Mills v. Malott, 43 Ind. 248; Stall v. Wilbur, 77 N. Y. 158; Hill v. Seager, 2 West Coast Rep. 673.

[2] Howlett v. Owens, 50 Cal. 474; S. C., 51 Id. 570.

[3] Whitney v. Stark, 8 Cal. 514; Rice v. Hollenbeck, 19 Barb. 664; Gock v. Kenneda, 29 Id. 120; Tanner v. Hills, 44 Id. 428. But see Yamhill Bridge Co. v. Newby, 1 Or. 173.

[4] Gilmore v. Wilbur, 12 Pick. 120.

[5] Merritt v. Walsh, 32 N. Y. 685; Donnell v. Walsh, 33 Id. 43; Buckman v. Brett, 22 How. Pr. 283; Id. 13 Ab. Pr. 119; see Bishop v. Edmiston, 13 Id. 346; Sherman v. Freem, 30 Barb. 478; Coster v. N. Y. & Erie R. R. Co., 6 Duer, 43; Dennis v. Kennedy, 19 Barb. 517.

[6] California Code C. P., sec. 369.

[7] 9 Co. 37; 1 Chitt. Pl. 13; 1 Saund. 291; 3 Bac. 32; Toll. 68; Bodle v. Hulse, 5 Wend. 313.

who have been appointed by the court should join; "those appointed have the same authority to perform all acts and discharge the trust required by the will, as effectually for every purpose as if all were appointed and should act together." But where there are two administrators, and only one acting, he may sue alone in his own right on a guaranty executed since decedent's death.[1]

Under the code, executors have the right to institute actions under the general authority conferred by statute.[2] But the provision that an executor may sue, without joining with him the person for whose benefit the action is prosecuted, has no application in case of an action for the construction of a will.[3]

In California, it is also provided that "actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."[4] In such section, actions to quiet title to lands are omitted. By section 1452 it is provided "that the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator."

As executors and administrators are required to take into their possession all the estate of the decedent, real and personal (section 1581), they must have the right to maintain an action for its possession, without being compelled to obtain the consent of the heirs or devisees, but it is not clear that the executor or administrator can bring an action to quiet title without joining the heir or devisee, under either of these provisions. However, in cases where it became necessary to the proper execution of the trust that such action should be brought, he might if the heirs or devisees refused to join as plaintiffs, make them defendants, under section 382.[5]

In construing these provisions it has been held that an executor or administrator can maintain an action, without joining his beneficiary, for the wrongful conversion or embezzlement of the property of his intestate;[6] or an action of replevin;[7] or for

[1] Packer v. Willson, 15 Wend. 343.
[2] Curtis v. Sutter, 15 Cal. 259; Halleck v. Mixer, 16 Id. 579; Teschmacher v. Thompson, 18 Id. 20.
[3] Hobart College, Trustees of, v. Fitzhugh, 27 N. Y. 130.
[4] California Code of Civil Procedure, sec. 1582.
[5] But see Curtis v. Sutter, 15 Cal. 259.
[6] Jahns v. Nolting, 29 Cal. 507; Beckman v. McKay, 14 Id. 250, referred to in Jahns v. Nolting, 29 Id. 512; Sheldon v. Hoy, 11 How. Pr. 11.
[7] Halleck v. Mixer, 16 Cal. 575.

trespass to the real property of the testator,[1] or to foreclose a mortgage;[2] or to set aside deeds fraudulently made by the deceased.[3] So, also, an administrator may maintain an action on a note made payable to him as administrator. But in Massachusetts an administrator of the deceased promisee and the surviving promisee of a promissory note can not join in bringing an action on the note.[5] Nor can an administrator *de bonis non* maintain an action in his own name for the price of goods of his intestate, sold by a previous administrator.[6]

On a demand due to the testator before his decease, the executor may sue either in his individual capacity, or in his capacity as executor.[7] So he may sue as administrator, or in his own right upon a note made or indorsed to him as administrator;[8] and in an action for conversion, after the death of the intestate, the administrator may sue in his own name properly, though the conversion took place before the granting of the letters of administration, as the letters relate back to the time of the death, and give title by relation.[9] And it has been held in New York that an executor may sue in two different capacities, as executor and devisee, where the causes of action are such as may be joined.[10]

A foreign executor or administrator can not sue in another state in his representative capacity. His authority does not extend beyond the jurisdiction of the government under which he was invested with his authority.[11] The objection that a foreign administrator can not sue must be taken by demurrer.[12]

But the assignee of the thing in action transferred by such foreign executor or administrator, may sue the debtor resident in another state. The disability of the representative is personal and does not affect the subject of the action; and in the application of this rule, executors or administrators made or appointed under the laws of any other state in the Union are regarded as foreign.[13]

[1] Haight v. Green, 19 Cal. 113; Rockwell v. Saunders, 19 Barb. 473.

[2] Harwood v. Marye, 8 Cal. 580.

[3] Cal. Code Civil Proc., sec. 1589. But see *contra*, Snyder v. Voorhies, 2 West Coast Rep. 616.

[4] Corcoran v. Doll, 32 Cal. 82; Copper v. Kerr, 3 Johns. Cas. 60; Eagle v. Fox, 28 Barb. 473; Robinson v. Crandall, 9 Wend. 425; Bright v. Currie, 5 Sandf. 433; Merritt v. Seamen, 2 Seld. 168.

[5] Smith v. Franklin, 1 Mass. 480.

[6] Calder v. Pyfer, 2 Cranch C. Ct. 430.

[7] Merritt v. Seaman, 6 N. Y. (2 Seld.) 168.

[8] Bright v. Currie, 5 Sandf. 433.

[9] Sheldon v. Hoy, 11 How. (N. Y.) 11.

[10] Armstrong v. Hull, 17 How. Pr. 76. Compare Pugsly v. Aiken, 11 N. Y. 494.

[11] Cal. Code C. P., sec. 1913.

[12] Robbins v. Wells, 18 Abb. (N. Y.) 191; S. C., Id., 26 How 15; Id., 1 Rob. 666.

[13] Peterson v. Chemical Bank, 32 N. Y. (5 Tiff.) 21.

§ 142. **Actions by Partners.**—It was the rule of the common law, and the same has remained unchanged by the code, that in actions for the benefit of the partnership, all the partners must be joined as parties to the actions. Thus all the partners should join in an action for the collection of a partnership debt, as for the recovery of the price of goods sold by the firm. It cannot be maintained in the name of one, although he is the general agent of the firm.[1] The same rule prevails in an action to recover against an inn-keeper for the loss of goods;[2] or in an action for damages for a deceit in the purchase of real estate for partnership purposes.[3] Whether a dormant or special partner is a necessary party plaintiff, is a question of practice which has been answered differently in different states. Many of the states have enacted statutes which dispense with the joinder of either the dormant or special partner.[4] In New York, however, it would seem that a dormant partner is a necessary party plaintiff[5] But when one partner is a member of two firms, one of which sues the other, he may elect to be either plaintiff or defendant.[6] An agreement to divide the gross earnings of a venture does not necessarily constitute the parties to it partners[7] Where one of the partners has died, the rule under the code and at the common law was that the right remained in the surviving partners to sue on the firm demands, without joining the personal representatives of the deceased partner. The surviving partners might assign the firm demands, even to the representatives of the deceased, in which case the assignee would be the proper party plaintiff.[8]

§ 143. **Foreclosure of Mortgages and Mechanics' Liens.** In actions to foreclose mortgages, all persons interested in the estate may be made parties. But no person holding an unrecorded mortgage, conveyance or lien, from or under the mortgagor at the commencement of the action, need be made a party to an action to foreclose a mortgage or lien.[9] Material men and

[1] Hyde v. Van Valkenburgh, 1 Daly, 416; Bridge v. Payson, 5 Sandf. 210; Mayhew v. Robinson, 10 How. Pr. 162; Briggs v. Briggs 20 Barb. 477; Id., 15 N. Y. 471; Sweet v Bradley, 24 Barb. 549; Halliday v. Doggett, 6 Pick. 359.

[2] Needles v. Howard, 1 E. D. Smith, 54.

[3] Medbury v. Watson, 6 Met. 246.

[4] Clark v. Miller, 4 Wend. 629; Clarkson v. Carter, 3 Cow. 84; Leveck v. Shaftoe, 2 Esp. 468; Mitchell v. Doll, 2 Harr. & Gill. 171.

[5] Secor v. Keller, 4 Duer. 413; but see Hurlbut v. Post, 1 Bosw 28; Brown v. Birdsall, 29 Barb. 549; Van Valen v. Russell, 13 Id. 500.

[6] Cole v. Reynolds, 18 N. Y. 76.

[7] Wheeler v. Farmer, Cal. Sup. Ct., July term, 1859, citing Patterson v. Blanchard, 1 Sold 180; Story on Part., sec. 34, and cases there cited in note 3.

[8] Roys v. Vilas, 18 Wis. 169; Brown v. Allen, 35 Iowa, 306, 311.

[9] California Code of Civil Procedure, sec. 726.

mechanics may join in an equitable action to establish and enforce their liens.[1] The mortgagee of a policy of insurance is the owner, and can alone maintain an action upon it.[2] But the party to whom the loss is made payable in the policy may sue in his own name, if not assigned, sold, or mortgaged.[3]

§ 144. **Principal and Agent.**—On contracts made by an agent, either express or implied, in the name of his principal, the latter is the proper party plaintiff. In such case the agent can not sue.[4] If, however, the contract, whether verbal or written, is entered into by the agent, in his own name, without disclosing his principal, either the principal or the agent may sue thereon. And the same is true if the contract is entered into by the agent in his own name, and the fact of the agency was known to the contracting parties at the time of the making of the contract.[5] Thus an agent may maintain an action on a promissory note payable to himself as agent.[6] So also the real owner of goods may maintain an action concerning them in his own name, and parol evidence is admissible to show the agency.[7]

§ 145. **Plaintiffs in Action on Promissory Notes.**—In actions on promissory notes the real party in interest, that is, the party having the right to the money thereon, is the proper person to sue.[8] The holder of such note is presumed to be the owner, in the absence of evidence to the contrary, and *prima facie* entitles him to sue thereon.[9] The fact that the plaintiff has not the actual possession of the note sued upon does not

[1] Barber v. Reynolds, 33 Cal. 497; Fitch v. Creighton, 24 How. 159.

[2] Ripley v. Astor Ins. Co., 17 How. Pr. 444; Ennis v. Harmony Fire Ins. Co., 3 Bosw. 516; but see Bidwell v. N. W. Ins. Co., 19 N. Y. 179; Bodle v. Chenango Ins. Co., 2 Id. 53.

[3] Frink v. Hampden Ins. Co., 45 Barb. 384.

[4] Erickson v. Compton, 6 How. Pr. 471; Union India Rubber Co. v. Tomlinson, 1 E. D. Smith, 364; St. John v. Griffith, 13 How. Pr. 59; Fish v. Wood, 4 E. D. Smith, 327; Haight v. Sahler, 30 Barb. 218; Stanton v. Camp, 4 Id. 274; Lane v. Columbus Ins. Co., 2 C. R. 65; Lineker v. Ayeshford, 1 Cal. 75; Phillips v. Henshaw, 5 Id. 509.

[5] St. John v. Griffith, 2 Abb. Pr. 198; Hall v. Plaine, 14 Ohio St. 417; Higgins v. Senior, 8 M. & W. 844; Sims v. Bond, 5 B. & Ad. 389; Bastable v. Poole, 1 C. M. & R. 410; Hicks v. Whitmore, 12 Wend. 548; Taintor v. Prendergast, 3 Hill. 72; Tyler v. Freeman, 3 Cush. 261; Frear v. Jones, 6 Iowa, 169; Usparicha v. Noble, 18 East, 232; Buffum v. Chadwick, 8 Mass. 103; Fairfield v. Adams, 16 Pick. 381; Morgan v. Reed, 7 Abb. Pr. 215; Van Lien v. Byrnes, 1 Hilt. 133; Ruiz v. Norton, 4 Cal. 358; Thurn v. Alta Tel. Co., 15 Id. 472; Crosby v. Watkins, 12 Id. 88.

[6] Ord v. McKee, 5 Cal. 515; Considerant v. Brisbane, 22 N. Y. 389; Reilly v. Cook, 22 How. Pr. 93.

[7] Union India Rubber Co. v. Tomlinson, 1 E. D. Smith, 361.

[8] Cummings v. Morris, 3 Bosw. 560; Selden v. Pringle, 17 Barb. 460; Hastings v. McKinley, 1 E. D. Smith, 273.

[9] Locket v. Davis, 3 McLean, 101; Halsted v. Lyon, 2 Id. 226; Curtis v. Sprague, 51 Cal. 239; McCann v. Lewis, 9 Id. 246; cited in Corcoran v. Doll, 32 Id. 88; Price v. Dunlap, 5 Id. 483; Gushee v. Leavitt, Id. 160; James v. Chalmers, 5 Sand. 52; affirmed in Lowber v. Leroy, 2 Sold. 209; Mottram v. Mills, 1 Sand. 37; Wiltsie v. Northam, 5 Bosw. 428; Farrington v. Park Bank, 39 Barb. 645.

affect his rights to recover upon it, if he be the real owner, although the note is in the possession of the defendant.[1] Conversely the mere holder of a note, without an interest in or title thereto, cannot maintain an action thereon.[2]

A party holding a promissory note, as trustee for himself and others, may recover.[3] So, a *bona fide* indorsee may recover.[4] Or the indorsee of a note for a consideration to be paid after collection may maintain action.[5]

§ 146. **Quo Warranto.**—The claimant of an office may join with the people as plaintiff in a proceeding of *quo warranto*.[6]

§ 147. **Action by Sheriff.**—A sheriff who levies an attachment, by virtue of the process of attachment can not maintain an action in his own name for the recovery of the debt.[7]

§ 148. **Action by State or United States.**—In the absence of any statute to that effect, the state can not be sued.[8] In an action to annul a patent for land, the state as well as persons having a right to the land may be joined as plaintiffs.[9] If the state has no interest in the matter, the action can not be sustained.[10] Actions for the recovery of an auctioneer's duty are properly brought in the name of the state.[11] The United States of America can sue in that name in chancery without putting forward any public officer who could be called on to give discovery on a cross-bill.[12]

§ 149. **Sureties as Plaintiffs.**—A surety on an undertaking who had paid the amount of his liability, is entitled to recover back the amount.[13] Co-sureties who pay the debt of their principal by giving their joint and several notes therefor, must join in a suit against him for reimbursement.[14] A surety paying a debt for which several persons are liable in distinct proportions, as principals, must proceed by a several action against each upon an implied *assumpsit*.[15]

[1] Selden v. Pringle, 17 Barb. 468; Hastings v. McKinley, 1 E. D. Smith, 273; McClusky v. Gerhauser, 2 Nev. 47; Curtis v. Sprague, 51 Cal. 239.

[2] Parker v. Totten, 10 How. Pr. 233; Clark v. Philips 21 Id. 87; Prall v. Hilchman, 6 Duer, 351.

[3] Palmer v. Goodwin, 5 Cal. 458; Hamilton v. McDonald, 18 Id. 128; Fletcher v. Derrickson, 3 Bosw. 181; but see Parker v. Totten, 10 How. Pr. 233; White v. Brown, 14 Id. 282; Clark v. Phillips, 21 Id. 87.

[4] Cummings v. Morris, 3 Bosw. 560; Potter v. Chadsey, 16 Abb. Pr. 146; Himmelman v. Hotaling, 40 Cal. 111.

[5] Cummings v. Morris, 25 N. Y. 625. As to transferee without consideration, see Killmore v. Culver, 24 Barb. 656.

[6] People v. Ryder, 12 N. Y. 433; affirmed, 2 Kern. 433; People v. Walker, 23 Barb. 304.

[7] Sublette v. Melhado, 1 Cal. 105.

[8] People v. Doe G. 1034, 36 Cal. 220.

[9] People v. Morrill, 26 Cal. 336; approved in Wilson v. Castro, 31 Id. 427.

[10] People v. Stratton, 25 Cal. 244.

[11] State v. Poulterer, 16 Cal. 514; see State v. Conkling, 19 Id. 509.

[12] United States of America v. Wagner, Law Rep., 2 Ch. App. Cas. 582.

[13] Garr v. Martin, 1 Hilt. 358; see Jewitt v. Crane, 13 Abb. Pr. 97; Id. 35 Barb. 208.

[14] Doolittle v. Dwight, 2 Met. 561; see Chandler v. Brainard, 14 Pick. 285; Appleton v. Bascom, 3 Met. 169

[15] Chipman v. Morrill, 20 Cal. 130

CHAPTER VII.

PLAINTIFFS IN ACTIONS ARISING FROM TORTS.

§ 150. **In General.**—Actions in form *ex delicto* are for injuries to the absolute or relative rights of persons, or to personal or real property. The proper party plaintiff in such action is the one who has suffered the injury, he being the real party in interest. This was the rule at common law, and it has remained substantially unchanged by the code. The principal changes made by the code, and by statute in other states, in respect to this class of actions, are those relating to the death or injury to the person of adults or minors, caused by the wrongful act or neglect of another, and those relating to seduction. The code has also made several important changes in regard to parties plaintiff in this class of actions by permitting assignments of certain causes of actions sounding in tort.[1]

§ 151. **For Injuries to Real Property.**—An injury to real property is primarily an injury to the possession, for which the party in possession, unless he hold for another as servant or agent, should bring the action. Where, however, the injury is of a permanent character, and one affecting the inheritance, the remainderman or reversioner may maintain an action, either for trespass on the case, or to enjoin the further continuance of the wrongful act.[2] Thus the equitable owner, in possession, may maintain an action for damage to the freehold.[3] Or he may sue for trespass.[4] On the same principle, the owner, redeeming from a sale under execution, may sue for waste intermediate between the sale and his redemption [5] So also an action can be maintained by the mortgagee of real estate to recover damages for wrongful and fraudulent injuries done to the mortgaged property, by which the security of the mortgage has been impaired.[6] But several parties can not, in a joint action, recover damage for the use and occupation of two or more tracts of land which they own in severalty.[7]

§ 152. **For Injuries to Personal Property.**—In actions for injuries to personal property, or for its conversion, the proper

[1] See *post*, Forms of Complaint: Assignees and Devisees.

[2] 1 Ch. P. 62, 63; Van Duesen v. Young, 20 Barb. 9; Lamport v. Abbott, 12 How. Pr. 340; Ulrich v. McCabe, 1 Hilt. 251.

[3] Rood v. N. Y. etc. R. R., 18 Barb. 80.

[4] Housee v. Hammond, 39 Barb. 89; Safford v. Hynds, Id. 625; Pierce v. Hall, 41 Id. 142; Sparks v. Leavy, 19 Abb. Pr. 364.

[5] Thomas v. Crofut, 4 Kern. 474.

[6] Robinson v. Russell, 24 Cal. 472.

[7] Tennant v. Pfister, 51 Cal. 511.

party plaintiff is generally the one having the right to the immediate possession, although in proper cases the general owner, whose reversionary interest has been injured, may sue.[1] If there are two or more joint owners of the property injured, they should all join.[2]

§ 153. **In Ejectment.**—At the common law, tenants in common could not join in an action of ejectment under a joint demise to the normal plaintiff, although the rule was different as to the joinder of joint tenants and coparceners.[3] Under the codes which provide that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs," such joinder is permitted [4] Except in California, Missouri, and Nevada, a joinder of tenants in common less than all is not permitted. They must all sue, or each one separately.[5] In the states named, however, a joinder of less than all is permitted.[6] Actions of ejectment must be prosecuted in the name of the real party in interest,[7] and the person having the legal title to the land, and not the one having the equitable title, is such party.[8] And to entitle him to sue he must be out of possession.[9] In California, the heir may maintain ejectment when there is no administration.[10] The rule that each of several heirs may sue in ejectment for payment of rent without joining the others, applies to the case of tenants in common of an incorporeal hereditament of rents charged in fee, and no reversion; the rents are apportioned in either case.[11] The grantee may bring an action to recover lands conveyed while in adverse possession, in the name of the grantor.[12]

§ 154. **For Injuries to the Person.**—Injuries to the person, although inflicted by the same act and by the same defendants, generally are several, and each person injured should

[1] 1 Ch. Pl. 61; Paddon v. Williams, 2 Abb. Pr. (N. S.) 88; Triscony v. Orr, 49 Cal. 612; Harrison v. Marshall, 4 E. D. Smith, 271; Wiggins v. McDonald, 18 Cal. 126; Summers v. Farish, 10 Id. 347; affirmed in Prader v. Purkett, 13 Id. 591; Drowner v. Davis, 15 Id. 11; McGinn v. Worden, 3 E. D. Smith, 355; Hall v. Robinson, 2 Comst. 293; Kellogg v. Church, 3 C. R. 53; Cass v. N. Y. and N. H. R. R. Co., 1 E. D. Smith, 522; Robinson v. Weeks, 1 C. R. (N. S.) 311; Van Hassel v. Borden, 1 Hilt. 128.

[2] Dubois v. Glaub, 52 Pa. St. 238; D'Wolf v. Harris, 4 Mason, 515.

[3] 1 Ch. Pl. 65.

[4] Woolfork v. Ashby, 2 Metc. (Ky.) 288.

[5] Cruger v. McLaury, 41 N. Y. 219; Hasbrouck v. Bunce, 62 Id. 479.

[6] Wag. Stat. 558, sec. 3; Cal. Code Civ. Proc., 384; Comp. Laws Nev., 1873, sec. 1077; Morenhaut v. Wilson, 52 Cal. 269.

[7] Ritchie v. Dorland, 6 Cal. 33.

[8] Emeric v. Penniman, 26 Cal. 122; O'Connell v. Dougherty, 32 Id. 462.

[9] Taylor v. Crane, 15 How. Pr. 358.

[10] Updegraff v. Trask 18 Cal. 458; Estate of Woodworth, 31 Id. 604; Soto v. Kroder, 19 Id. 87.

[11] Cruger v. McClaughry, 51 Barb. 642.

[12] Lowber v. Kelly, 9 Bosw. 494.

sue alone. This rule is not universal, as the wrongful act may injure two or more persons in their joint relation, in which case they may join. Thus in action for libel or slander against a partnership the partners may join.[1]

§ 155. **The Same—Injuries to Married Woman.**—At the common law, for injuries to a married woman, the right of action was in the husband, although in certain cases the wife must join. As stated by Chitty, the rule was substantially this: "If the cause of action survive to the wife, she must be joined as plaintiff; as where the injury was before marriage, or, if it was inflicted after marriage, it be of such a nature as to bring personal suffering to the wife, or if it injures her personally; as a battery, false imprisonment, or slander by words actionable *per se*.[2] And the same rule prevailed in regard to injuries to the wife's property. If the cause of action survived to her, she should join, otherwise not.[3] The code has made sweeping changes in regard to the common-law rules concerning the joinder of husband and wife. In California the code provides that "when a married woman is a party, her husband must be joined with her, except—1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone; 2. When the action is between herself and her husband she may sue or be sued alone; 3. When she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone."[4] In

[1] 1 Ch. Pl. 64; Forster v. Lawson, 11 Moore, 360; Cook v. Batchellor, 3 Bos. & Pul. 150; Maitland v. Goldney, 2 East, 426; see also note to Corryton v. Lithebye, 2 Wm. Saund. 361.

[2] 1 Ch. Pl. 73, and note 3; Bliss on Code Pl., sec. 27.

[3] 1 Ch. Pl. 75.

[4] Cal. Code Civ. Proc., sec. 369. Similar statutes have been passed in all the code states. Such statutes differ somewhat in their details, but their general results are substantially the same; Comp. Laws Nev., sec. 1070; Rev. and Comp. Laws of Idaho, sec. 7. In Iowa a married woman may in all cases sue and be sued, without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment shall be enforced by or against her as if she were a single woman: Code of Iowa, sec. 2562. The Oregon code, section 30, is the same as section 369 of the California code, except that the third subdivision is omitted, and the clause "and in no case need she prosecute or defend by a guardian or next friend," is added. Ohio code, section 28, is as follows: "Where a married woman is a party, her husband must be joined with her, except that where the action concerns her separate property, or is between herself and husband, she may sue or be sued alone; and in every such case her separate property shall be liable for any judgment rendered therein against her to the same extent as would the property of her husband were the judgment rendered against him; but in no case shall she be required to prosecute or defend by her next friend." Formerly the code of New York (section 114) was the same as the above section of the Ohio code, omitting the clause in regard to the liability of her separate property; but the new code, passed June 2,

construing these provisions of the code, it has been held that in actions for injuries to the wife's person or character, she must join with her husband;[1] while, for injuries to her separate estate, whether the same arise from deceit, trespass, or conversion, she may sue alone, or her husband may be joined with her, as the provision authorizing her to sue alone has generally been held permissive, except in those states which absolutely require the action to be prosecuted by the wife alone.[2] So also if the cause of action arises from contract the wife may sue alone if it concerns her separate estate, or her husband may join with her in such action.

There is no statutory limitation as to the kind of actions that may be maintained by the wife when they concern her separate property, or are against her husband. Thus a married woman may sue alone on a promissory note forming a part of her separate estate,[3] although such note was given to her by her husband before marriage, and he is the party sought to be held liable in the action.[4] Nor is it necessary, under this section, for the wife to sue by a *prochein ami*.[5] In New York a married woman, it seems, can not sue her husband for assault and battery;[6] nor for libel or slander;[7] nor in ejectment.[8] But she may sue him for alimony, without bringing an action for divorce.[9] In California, the possession of either of the spouses as to the community property is the possession of the other,

1876, has the following provision, section 450: "In an action or special proceeding, a married woman appears, prosecutes, or defends, alone or joined with other parties, as if she was single." Minnesota, Kansas, and Nebraska have provisions similar to those of New York and Iowa.

[1] Pomeroy's Remedies, sec. 237.

[2] Palmer v. Davis, 28 N. Y. 242; Newbery v. Garland, 31 Barb. 121; Ackley v. Tarbox, 31 N. Y. 564; Van Maren v. Johnson, 15 Cal. 308; Kays v. Phelan, 19 Id. 128; Calderwood v. Pyser, 31 Id. 333; Corcoran v. Doll, 32 Id. 90. In Calderwood v. Pyser, *supra*, it was held, "that an action which concerned the separate property of the wife, and in which the husband and wife joined, did not abate in consequence of a divorce; the parties survived the divorce, and the cause of action survived. The husband was joined, not because he owned the property, but because of his relation to the other plaintiff. His relation ceased by the divorce, but the right of action continued in the wife, where it was before. But supposing the interest in the action terminated as to the husband upon the entry of the judgment for divorce, there was still the same cause of action in favor of the wife, the real party in interest, which she was entitled to prosecute in her own name, without joining a person whom she afterwards married, and the most that could be said was that there was a misjoinder of parties plaintiff from that time forward; and that objection, not having been taken either by demurrer or answer, was waived."

[3] Corcoran v. Doll, 32 Cal. 82; Smart v. Comstock, 24 Barb. 411.

[4] Wilson v. Wilson, 36 Cal. 447.

[5] Kashaw v. Kashaw, 3 Cal. 312.

[6] Longendyke v. Longendyke, 44 Barb. 366.

[7] Freethy v. Freethy, 42 Barb. 641.

[8] Gould v. Gould, 29 How. Pr. 441.

[9] Galland v. Galland, 38 Cal. 265.

and neither can sue the other for the conversion thereof.[1] The provision of the section authorizing the wife to be sued alone when living separate and apart from her husband, has no application to a mere temporary absence of the wife from her husband. There must have been an abandonment on the part of the husband or wife, or a separation which was intended to be final.[2]

§ 156. **For Injuries to Minor Child or Servant.**—Both at the common law and under the code, the master may recover damages for injuries to his servant or minor child. The gist of the cause of action is the loss of the service of the servant or child. Under the code it is provided that a "father, or in case of his death or desertion of his family, the mother, may maintain an action for the death or injury of a minor child, and a guardian for the death or injury of his ward, when such death or injury is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person."[3] Under this section the minor may sue by his guardian and recover for the injuries he has sustained; or the parent may sue and recover for the damages sustained by him. If the minor sue, he can not recover for the special damages sustained by the parent; and the parent may bring and sustain his action for such special damages, notwithstanding the recovery by the child. If the child do not sue, the parent can not, in the same action, recover his special damages, and also the damages which the child might recover, if he brought suit by his guardian, the action, when brought by the parent, being one of that class which is permitted to be brought without joining the person for whose benefit it is brought, and unless the action, when brought by the parent, is to be regarded as for the benefit of the minor, there would seem to be no obstacle in recovering in an action brought by the child. In actions for injuries resulting in death, the measure of damages is left to the sound discretion of the jury.

§ 157. **For Seduction.**—The codes have made great changes, in some of the states in the rules of the common law in regard to the liabilities for seduction. Section 374 of the California code provides that "an unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover

[1] Schuler v. Savings and Loan Soc., 1 West Coast Rep. 525.
[2] Tobin v. Galvin, 49 Cal. 36.
[3] California Code Civil Proc., sec. 376.

therein such damages, pecuniary and exemplary, as are assessed in her favor." Section 375 provides that "a father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service." Neither of these sections imposes any restrictions upon the right to maintain the action. The unmarried female, whatever her age, whether living with her father or guardian, or not, may maintain the action. Nor does the right of the father or guardian depend upon the question whether the female is living with or in the service of the father or guardian. Some questions as to the measure of damages, and the right to maintain several actions for the same seduction, arise which are not free from difficulties. If the female who has been seduced be at the time a minor, and living with her father, the loss of service accrues to him. Can she recover for that? May she maintain the action and recover all other damages, and her father maintain a separate action and recover for the loss of services? If so, can he recover anything more unless he has incurred expenses directly caused by the seduction? If the seduction occurs after she has attained her majority, can the father maintain any action therefor? If he can, does the recovery go for his benefit, or only for the daughter's? Would a recovery by him bar an action brought by the daughter? Or a recovery by the daughter bar an action brought by the father? Section 3339 of the civil code declares, "the damages for seduction rest in the sound discretion of the jury." Section 49 of the civil code provides, "the rights of personal relation forbid: 3. The seduction of a wife, daughter, orphan sister, or servant." The rule in relation to actions for torts is, that "the person who sustains an injury is the person to bring an action for the injury against the wrong-doer."[1]

Under the penal code of California seduction is a felony. At common law no action could be sustained for damages in cases where the wrong amounted to a felony. These provisions of the code of civil procedure, however, give the right to maintain the action, but whether the common-law rule that an action based upon a tort can not be maintained by any one who has not suffered legal damages, is changed by these provisions, is not free from difficulty.

[1] Dicey on Parties, 330.

It is true that formerly the woman who was seduced could not maintain the action, having (on the ground *volenti non fit injuri*) suffered no legal wrong; and the person who can bring an action is the parent or master, who sues, in theory, at least, for the wrong to him, viz.: the loss of service. The action, therefore, could be brought by any one who stood in the relation of master to the woman seduced, whether he were merely the master, or the parent, brother, or other near relative of the woman. Nor was it any objection that the woman was of age at the time of the seduction; and it has been held, in a case where she lived with her father and acted as his servant, no objection to the action that she was a married woman.[1] But service of some sort was held to be absolutely essential. Where, therefore, the daughter was living independently, and supporting herself and the family, neither the parent nor any one else could maintain an action for her seduction.[2]

Under section 375 of the California code, it is plain that the "service," which was formerly essential, is dispensed with as a foundation of the right of the parent to sue; and we may, therefore, conclude that the parent has the right now, independently of any loss of services, to recover to the same extent as formerly. If this be true, it would follow that a recovery by the parent would be a bar to an action brought by the daughter; and that a recovery by the daughter would be a bar to an action brought by the parent for more than special damages (if any were sustained) which from their nature could not have been included in the former recovery. Section 34 of the Oregon code is identical with section 375 of the California code, but section 35 of the Oregon code restricts the right of an unmarried female to sue for her own seduction to those over twenty-one years of age; and further provides that the prosecution of an action to judgment by the father, mother, or guardian, as prescribed in section 34, shall be a bar to an action by such unmarried female.

[1] Harper v. Luffkin, 7 B. & C. 387.
[2] Manly v. Field, 29 L. J., 79 C. P., 7 C. B. U. S. 96.

CHAPTER VIII.

DEFENDANTS IN ACTIONS ARISING FROM CONTRACTS, TORTS, AND IN EQUITABLE ACTIONS.

§ 158. **At the Common Law, All Persons who were Jointly Liable** on the same contract or obligation must be joined in an action thereon. In determining whether such liability was joint, the rule was that "several persons contracting together with the same party for one and the same act shall be regarded as jointly, and not individually or separately, liable, in the absence of any express words to show that a distinct as well as entire liability was intended to fasten on the promisors."[1] This common-law rule has been changed in most if not in all of the states which have adopted codes of procedure. In California, the civil code provides that "when all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several.[2] In regard to the joinder of such parties the code provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a comp ete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant,"[3] and "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have joined as plaintiff can not be obtained, he may be made a defendant;"[4] and persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff."

§ 159. **Annulling a Patent to Land.**—In an action to set aside a patent to land, the patentee is a necessary party defend-

[1] 1 Ch. Pl. 41.

[2] Civil Code, sec. 1659.

[3] California Code C. P., sec. 379; 1 Van Santv. Pl. Eq. Pr. 74; N. Y. Code, 1877, sec. 447; 1 Van Santv. Pl. 119; Nash's Ohio Pl., sec. 36; Laws of Iowa, sec. 2762; Oregon, sec. 40; Idaho, sec. 13; Nevada, sec. 13; Arizona, sec. 13.

[4] California Code C. P., sec. 382. Similar provisions are found in the codes of other states.

ant. His rights can not be determined or impaired in any side suit between third parties.[1]

§ 160. **Actions against Assessors.**—In Massachusetts, assessors are jointly, as well as severally, liable, for illegally assessing and collecting a tax.[2]

§ 161. **For Breach of Contract.**—All persons materially interested in the subject-matter of the suit should be made parties, either plaintiff or defendant.[3] But in an action for damages for breach of contract, only the parties to the contract should be joined as defendants.[4] And in a suit to enforce a covenant not to carry on a certain trade, the original covenantor is not a proper party if he has parted with all interest and is not in fault.[5] It is held in Massachusetts that heirs are jointly chargeable, as assigns on a covenant of their ancestor which runs with the land that descends to them.[6] So, with guardians severally appointed for different heirs.[7] In New York, persons severally liable should not be joined in the same action as defendants.[8]

§ 162. **Actions against Executors and Administrators.** In California the executor and administrator of a decedent is entitled to the possession of the entire estate of the deceased, both real and personal. The code provides that "actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."[9] "Any person, or his personal representatives, may maintain an action against the executor or administrator of any testator or intestate who in his life-time has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person."[10] And "in actions for or against executors or administrators, it is not necessary to join those as parties to whom letters were issued, but who have not qualified."[11] The code also contains minute provisions requir-

[1] Boggs v. Merced Mining Company, 14 Cal. 279; approved in Yount v. Howell, 14 Id. 469; Pioche v. Paul, 22 Id. 111.

[2] Withington v. Eveleth, 7 Pick. 106.

[3] Burton v. Lies, 21 Cal. 87; affirmed in Carpentier v. Williamson, 25 Id. 161; Wilson v. Castro, 31 Id. 420.

[4] Barber v. Cazalis, 30 Cal. 92.

[5] Clements v. Welles, L. R., 1 Eq. 200.

[6] Morse v. Aldrich, 1 Met. 544.

[7] Donohoe v. Emery, 9 Met. 63.

[8] Le Roy v. Shaw, 2 Duer, 626; Phalen v. Dingee, 4 E. D. Smith, 379; Spencer v. Wheelock, 11 N. Y. Leg. Obs. 329.

[9] California Code Civ. Proc., sec. 1582.

[10] Id., sec. 1584.

[11] Id., sec. 1587.

ing a creditor of a deceased to present his claim against the estate to the executor or administrator of the deceased for allowance before he can maintain an action thereon.[1] In construing these provisions of the code, it has been repeatedly held that the general right to sue an executor or administrator was taken away by statute, except in cases where the creditor's claim has been properly presented and rejected.[2] If an executor has come into possession of the trust fund or its substitute, so that the same can be identified, he can be held to account and charged as trustee, upon the same terms as his testator held the trust, and the relation of trustee and *cestui que trust* is added to that of executor.[3] In suit for specific performance of testator's contract for sale of lands, the executor of deceased should join as plaintiff.[4] In an action for specific performance against heirs on their ancestor's contract, where damages are demanded in the alternative, the executors or administrators should be made parties, or no judgment can be taken for such damages.[5] In Nevada a joint action can not be maintained against the survivor and the administrator of a deceased maker of a promissory note:[6] and the same would seem to be the rule in California. The reason assigned for this rule is that the judgment against the survivor would have to be *de bonis propriis*, and against the executor or administrator *de bonis testatoris*.[7]

It is a general rule of law that no action will lie against an executor or administrator to which his testator or intestate was not liable.[8] The estate, represented by a person upon whom the duty of keeping the premises in repair is cast, is no more liable for his neglect of that personal duty than it would be for a fine which might be imposed upon him by a criminal court for an assault and battery committed by him while in possession of such estate.[9] In actions for the foreclosure of a mortgage, against the estate of a deceased mortgagor, his heirs are not necessary parties.[10]

§ 163. **Foreclosure of Mortgages and Mechanics' Liens.** In actions to foreclose mortgages, all parties who own or have

[1] See this subject discussed under Forms of Complaints: Actions by Executors and Administrators.

[2] Ellisen v. Halleck, 6 Cal. 393; Hentsch v. Porter, 10 Id. 559; Eustace v. Jahns, 38 Id. 3.

[3] Lathrop v. Bampton, 31 Cal. 17.

[4] Adams v. Green, 34 Barb. 176; see Cal. Code Civ. Proc., sec. 1582.

[5] Massie's Heirs v. Donaldson, 8 Ohio, 377.

[6] Maples v. Geller, 1 Nev. 233.

[7] Bank of Stockton v. Howland, 42 Cal. 129.

[8] 2 Williams on Executors, p. 1478; Eustace v. Jahns, 38 Cal. 3.

[9] Craton v. Wensiger, 2 Tex. 202; Able v. Chandler, 12 Id. 92; Eustace v. Jahns, 38 Cal. 3.

[10] Bailey v. Muehe, 1 West Coast Rep. 125, 263; 3 Id. 195.

an estate in the land to be sold under the decree, and those who, either originally or by assignment, are liable on the mortgage debt, are necessary parties. It is proper, however, to join as defendants all persons materially interested in the subject-matter of the controversy.[1] Thus the owner of the equity of redemption is a necessary party to a foreclosure suit.[2] And the same is true of the grantee of the mortgagor.[3] But where the payment of the mortgage debt is assumed by the grantee, as between himself and the mortgagor, although the grantee is a necessary party, the grantor is not.[4] In New York and other states the wife of the mortgagor, or of the subsequent grantee, is a necessary party, in order to cut off her equity of redemption.[5] An assignee in bankruptcy of the mortgagor is a necessary party, and if not joined may sue to redeem.[6] But an assignment in bankruptcy pending suit does not make the assignee a necessary party.[7]

If a mortgage is assigned as a security, the assignor is a necessary party.[8] So the assignor of a mortgage who guarantees its payment.[9] Otherwise if there is no express covenant to pay, though it forms part of the purchase-money.[10]

In a foreclosure of mortgage given by trustees the *cestuis que trust* are necessary parties.[11] When an action is brought to foreclose a mortgage securing the payment of a promissory note, the maker and indorser of the note may be joined as defendants.[12] A writ of entry to foreclose a mortgage may be main-

[1] Luning v. Brady, 10 Cal. 265; Montgomery v. Tutt, 11 Id. 307; Tyler v. Yreka Water Co., 14 Id. 212; De Leon v. Higuera, 15 Id. 483; Goodenow v. Ewer, 16 Id. 461; McDermott v. Burke, Id. 580; Burton v. Lies, 21 Id. 87; Horn v. Jones, 28 Id. 194; Anthony v. Nye, 30 Id. 401; Carpenter v. Brenham, 40 Id. 221; Brainard v. Cooper, 6 Seld. 356; Peck v. Mallams, Id. 509; Walsh v. Rutgers Fire Ins. Co., 13 Abb. Pr. 33; Case v. Price, 17 How. Pr. 348; 9 Abb. Pr. 111.

[2] Reed v. Marble, 10 Paige, 409; Dexter v. Arnold, 1 Sumn. 109; Gordon v. Lewis, 2 Id. 143; Griswold v. Fowler, 6 Abb. Pr. 120; N. Y. Life Ins. and Trust Co. v. Bailey, 3 Edw. Ch. 417; Crooke v. O'Higgins, 14 How. Pr. 154; see Bank of Orleans v. Flagg, 3 Barb. Ch. 316; Case v. Price, 9 Abb. Pr. 118.

[3] Skinner v. Buck, 29 Cal. 253; Heyman v. Lowell, 23 Id. 106.

[4] Drury v. Clark, 16 How. Pr. 424; Van Nest v. Latson, 19 Barb. 604; Stebbins v. Hall, 29 Id. 524; McArthur v. Franklin, 15 Ohio St. 485.

[5] Denton v. Nanny, 8 Barb. 618; Dexter v. Arnold, 1 Sumn. 109; Gordon v. Lewis, 2 Id. 143; Wheeler v. Morris, 2 Bosw. 524; Vartie v. Underwood, 18 Barb. 561; Mills v. Van Voorhies, 20 N. Y. 412; Blydenburg v. Northrop, 13 How. Pr. 289; Brownson v. Gifford, 8 Id. 389; Pinckney v. Wallace, 1 Abb. Pr. 82; Lewis v. Smith, 11 Barb. 152; Union Bank v. Bell, 14 Ohio St. 200.

[6] Winslow v. Clark, 47 N. Y. 261.

[7] Cleveland v. Boerum, 24 N. Y. 613; Daly v. Burchell, 13 Abb. Pr., N. S., 264.

[8] Kittle v. Van Dyck, 1 Sand. Ch. 76.

[9] Bristol v. Morgan, 3 Edw. Ch. 142.

[10] Lockwood v. Benedict, 3 Edw. Ch. 472.

[11] Piatt v. Oliver, 2 McLean, S. Ct. 267.

[12] Eastman v. Turman, 24 Cal. 382.

tained against a tenant in possession.[1] Where infants having an equitable vested remainder in fee, liable to be defeated by their dying in the life-time of the equitable tenant for life, were not made parties, they are not bound by the decree.[2] And where there are several future and contingent interests, the person who has the first vested estate of inheritance and all other persons having prior rights or interests in the premises must be made parties; though every person having a future or contingent interest is not a necessary party.[3] In such suit, where the defendant dies after the commencement of suit, the administrator becomes a necessary party in a petition for decree of sale of mortgaged premises, if it is sought to have a judgment over against the estate for any deficiency.[4]

In general, all incumbrancers prior and subsequent are proper parties defendant, and should be joined if it is desired to secure a judgment binding them.[5] But an incumbrancer who becomes such pending suit is not entitled to redeem, and therefore need not be made a party.[6]

But in California, no person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered and the proceedings therein had are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.[7] Suits for the foreclosure of a mechanic's lien are in many respects analogous to those in ordinary foreclosure. All parties necessary to enable the court to do complete justice may be joined.[8]

§ 164. **Action for Fraud.**—In an action to obtain relief from a judgment fraudulently procured, the attorney at law charged with being a party to the fraud should be joined with the client.[9] So partners may be jointly sued for fraudulently

[1] Fales v. Gibbs, 5 Mason C. C. 462.
[2] Williamson v. Field, 2 Sand. Ch. 533.
[3] Nodine v. Greenfield, 7 Paige Ch. 544.
[4] Belloc v. Rogers, 9 Cal. 123; see Fallon v. Butler, 21 Id. 24.
[5] Filney v. Bank of United States, 11 Wheat. S Ct. 304; Matcalm v. Smith, 6 McLean S. Ct. 416; Ensworth v. Lambert, 4 Johns. Ch. 605; Haines v. Beach, 3 Id. 461.
[6] Cook v. Mancius, 5 Johns. Ch. 89; Loomis v. Stuyvesant, 10 Paige Ch. 490; People's Bank v. Hamilton Mfg. Co., 10 Id. 481; see Bishop of Winchester v. Paine, 11 Ves. 194.
[7] Code C. P., sec. 726.
[8] Sullivan v. Decker, 1 E. D. Smith, 699; Lowber v. Childs, 2 Id. 577; Foster v. Skidmore, 1 Id. 719; Kaylor v. O'Connor, Id. 672.
[9] Crane v. Hirschfelder, 17 Cal. 467.

recommending an insolvent person as worthy of credit.[1] Or for deceit in a sale, if both knowingly make false representations, though only one was interested in the expected fruits of the fraud.[2] So in an action to set aside a conveyance as made without consideration and in fraud of creditors, the fraudulent grantor is a necessary party defendant.[3]

§ 165. **In Ejectment.**—The general rule is, that ejectment can be maintained only against the real party in possession, although he is not personally on the premises, but may be in possession through servants and employes.[4] A mere party, in charge, for others, is not an occupant.[5] A railroad company who have simply laid rails on a public highway are not occupants.[6] But if the landlord be joined with the tenant as defendant in an action of ejectment, judgment, if for the plaintiff, must be against both.[7]

In ejectment against mining claims, it is not necessary to include as defendants those holding other undivided interests.[8] But a landlord may come in and defend in an action in ejectment, where summons is served on a tenant, by a proper showing, even after a default is taken. The statute should in such cases be construed so as to dispose of actions of this character as nearly on their merits as possible, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided.[9] A landlord may defend in the name of the tenant, but not in his own name.[10] Persons renting different apartments in the same house may be joined as defendants.[11] And the same is true of parties claiming title, accompanied by acts of ownership, to unoccupied premises.[12] And any number may be made defendants, subject to their right to answer separately.[13]

§ 166. **Married Woman.**—In California, where a married woman is a party, her husband must be joined with her,

[1] Patten v. Gurney, 17 Mass. 182.
[2] Stiles v. White, 11 Met. 356.
[3] Gaylords v. Kelshaw, 1 Wall. (U. S.) 81.
[4] Polack v. Mansfield, 44 Cal. 36; see also Valentine v. Mahoney, 37 Id. 389, where the question is discussed as to the applicability of section 13 of the practice act (Code C. P., sec. 379, first clause) to the action of ejectment.
[5] Hawkins v. Reichert, 28 Cal. 534; People v. Ambrecht, 11 Ab. Pr. 97.
[6] Redfield v. Utica & Syracuse R. R. Co., 25 Barb. 54.
[7] Code C. P., sec. 379.
[8] Waring v. Crow, 11 Cal. 366.
[9] Roland v. Kreyenhagen, 18 Cal. 455; see also Ried v. Calderwood, 22 Id. 465; Barrett v. Graham, 19 Id. 632; affirmed in Bailey v. Taafe, 29 Id. 424.
[10] Dimick v. Deringer, 32 Cal. 488; see also Valentine v. Mahoney, 37 Id. 393; Hussman v. Wilke, 50 Id. 250; Garner v. Marshall, 9 Id. 270.
[11] Pearce v. Colden, 8 Barb. 522.
[12] Garner v. Marshall, 9 Cal. 268; Taylor v. Crane, 15 How. Pr. 358.
[13] Winans v. Christy, 4 Cal. 70; Ritchie v. Dorland, 6 Id. 33; Ellis v. Jeans, 7 Id. 417; Curtis v. Sutter, 15 Id. 264; Marion v. Folger, Id. 276; Leese v. Clark, 28 Id. 35; Fosgate v. Herkimer etc. Hyd. Co. 12 Barb. 352.

except: 1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone; 2. When the action is between herself and her husband, she may sue or be sued alone; 3. When she is living separate and apart from her husband by reason of his desertion of her, or by agreement in writing entered into between them she may sue or be sued alone.[1] If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.[2]

For any fraud or deceit practiced by the defendant, whether the injury were wrought through the form of a contract or not, affecting the common property, the remedy is by the husband alone.[3] The husband of a married woman is properly joined with her as a party defendant in an action upon a partnership obligation contracted by the wife and third persons as partners previous to the marriage and while she was a *feme sole*.[4] The wife is an improper party to a suit brought to recover money loaned to her to complete the amount of purchase money for a lot of ground, the deed of which was executed to her, but which became common property, and which purchase was afterwards ratified by the husband. There could be no personal judgment against the wife.[5] In California, the wife may appear in and defend an action separately from her husband.[6] Where the defense of the wife is a special one, she can defend for her own right as well when sued jointly as if the trial was separate.[7] To enable her to defend in her own right, she must possess as defendant the rights of a *feme sole*.[8] In an action pertaining to

[1] Code C. P., sec. 370.

[2] Code C. P., sec. 371; Laws of Iowa, sec. 2774; Idaho, sec. 8; Nevada, sec. 29; N. Y. Code, 1877, sec. 8; Ohio, sec. 29; N. Y. Code, 1877, sec. 450. As to what is separate property, see California Civil Code, secs. 162, 163. In actions brought under subdivision second of this section, the test is simply to ascertain if the suit is between her and her husband; and this being found in the affirmative, the necessity of introducing other parties can not affect her right: Kashaw v. Kashaw, 3 Cal. 321. In actions brought under subdivision 3, a temporary absence does not come within the meaning of the act. There must have been an abandonment on the part of the husband or wife, or a separation which was intended to be final: Tobin v. Galvin, 49 Cal. 36, 37. The wife can appear in and defend an action separately from her husband; she therefore possesses, as defendant, all the rights of a *feme sole*, and is able to make as binding admissions in writing as other parties: Alderson v. Bell, 9 Cal. 321. The statute confers only a privilege which in many instances it may be important for the wife to assert for the protection of her interests, and in the exercise of which the fullest liberty should be accorded to her: Van Maren v. Johnson, 15 Cal. 311.

[3] Barrett v. Tewksbury, 18 Cal. 336.

[4] Keller v. Hicks, 22 Cal. 457.

[5] Althof v. Conheim, 38 Cal. 230.

[6] Alderson v. Bell, 9 Cal. 315; approved in Leonard v. Townsend, 26 Id. 445.

[7] Deuprez v. Deuprez, 5 Cal. 387.

[8] Alderson v. Bell, 9 Cal. 315; Leonard v. Townsend, 26 Id. 445.

her property as sole trader under the act of 1852, the husband need not be joined.[1]

The husband is properly joined with the wife in an action upon an obligation contracted by the wife previous to marriage.[2] In a suit to foreclose a mortgage, and set aside a fraudulent conveyance of property by the husband to the wife, the wife was properly joined with the husband as a defendant.[3] And in a foreclosure of a husband's mortgage for the purchase money of the wife's separate estate, both must be joined.[4] So, also, where the wife executes a mortgage with her husband.[5] So, in partition suits, the wife must be joined with her husband as defendant.[6] In forcible entry and detainer, also, the husband is properly joined in the action.[7] So, also, where the homestead is involved, the wife must be joined as defendant in certain cases.[8] For the torts of the wife, committed out of the presence of the husband, the latter must be joined.[9]

§ 167. **Actions by Infants.**—When an infant is a party, he must appear either by his general guardian, or by a guardian appointed by the court in which the action is prosecuted, or by a judge thereof. A guardian may be appointed in any case, when it is deemed by the court in which the action is prosecuted, or by a judge thereof, expedient, to represent the infant in the action, notwithstanding he may have a general guardian, and may have appeared by him.[10] When the infant is defendant, a guardian will be appointed upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of

[1] Guttman v. Scannell, 7 Cal. 455. For other authorities see Dunderdale v. Grymes, 16 How. Pr. 195; Rouillier v. Wernicki, 3 E. D. Smith, 310; Avogadro v. Bull, 4 Id. 385; Freeman v. Orser, 5 Duer, 477. And she must be sued alone: McKune v. McGarvey, 6 Cal. 497; approved in Guttman v. Scannell, 7 Id. 455; and Camden v. Mullen, 29 Id. 564.

[2] Keller v. Hicks, 22 Cal. 457.

[3] Kohner v. Ashenauer, 17 Cal. 579.

[4] Mills v. Van Voorhies, 20 N. Y. 412; 10 Abb. Pr. 152; Rusher v. Morris, 9 How. Pr. 266.

[5] Anthony v. Nye, 30 Cal. 401; Conde v. Shepard, 4 How. Pr. 75; Conde v. Nelson, 2 Code R. 58.

[6] De Uprey v. De Uprey, 27 Cal. 329; Ripple v. Gilborn, 8 How. Pr. 460; Tanner v. Niles, 1 Barb. 563.

[7] See Howard v. Valentine, 20 Cal. 282.

[8] Sargent v. Wilson, 5 Cal. 504; approved in Moss v. Warner, 10 Id. 297; Revalk v. Kræmer, 8 Id. 66; Marks v. Marsh, 9 Id. 96; Horn v. Volcano Wat. Co., 13 Id. 70; Anthony v. Nye, 30 Id. 401.

[9] Anderson v. Hill, 53 Barb. 238; Peak v. Lemon, 1 Lans. 295; Tait v. Culbertson, 57 Barb. 9; Kowing v. Manley, Id. 479; 49 N. Y. 192; Brazil v. Moran, 8 Minn. 236; Ball v. Bennett, 21 Ind. 427; Turner v. Hitchcock, 20 Iowa, 310; Musselman v. Galligher, 32 Id. 383; McElfresh v. Kirkendall, 36 Id. 224; Luse v. Oaks, Id. 562; Curd v. Dodds, 6 Bush, 681; Coolidge v. Parris, 8 Ohio St. 594.

[10] Cal. Code C. P., sec. 372.

any other party to the action, or of a relative or friend of the infant.[1]

§ 168. **For Infringement of Patent.**—In selling an article which infringes upon a patent, the agent may be joined with the manufacturer as a party defendant in an action against them as trespassers.[2]

§ 169. **Injunction.**—In an action to enjoin the issuance of bonds by fund commissioners, it is necessary that some of the parties to whom bonds are to be issued should be parties defendant.[3] In a bill of peace to restrain vexatious litigation, although some of the parties be mere accommodation grantees, they have a right to be heard at law in their own defense.[4] Whe e one of the defendants in a joint judgment sues to have the judgment perpetually enjoined, his co-defendants should be made parties to the action.[5]

§ 170. **Injuries Caused by Negligence.**—In an action to recover for damage done to the property of the plaintiff by reason of the breaking away of a dam built by contractors, when the employers exercise no supervision, give no directions, furnish no materials, and have not accepted the work, the contractors alone are liable.[6] After the acceptance of the work, the owner is also liable for damage resulting from faulty construction.[7] Common carriers, for loss of goods, may be sued jointly or severally.[8]

§ 171. **Action for Legacy Charged on Land.**—Purchasers of land in unequal portions, charged with the payment of a legacy, must be joined in an action for the legacy.[9]

§ 172. **Actions against Partners.**—In California partners may be sued by their common name, whether it comprises the names of the persons associated or not.[10] In such case the statute provides that the judgment may run against the joint and individual property of the party served, and against the joint property of the partner not served. The constitutionality of the statute, so far as it attempts to impose a liability upon the person or property of the partner not served, has been more than doubted.[11] But a party can only be bound on a note

[1] Cal. Code C. P., sec. 373, subdiv. 2; N. Y. Code, sec. 116; Laws of Oregon, sec. 27.

[2] Buck v. Cobb, 9 Law Rep. 545; see Bryce v. Dorr, 3 McLean, 582.

[3] Hutchinson v. Burr, 12 Cal. 103; affirmed in Patterson v. Yuba Co., Id. 105.

[4] Knowles v. Inches, 12 Cal. 212.

[5] Gates v. Lane, 44 Cal. 392.

[6] Boswell v. Laird, 8 Cal. 469; Du Pratt v. Lick, 38 Id. 691; O'Hale v. Sacramento, 48 Id. 212.

[7] Boswell v. Laird, 8 Cal. 469; Fanjoy v. Seales, 29 Id. 249.

[8] McIntosh v. Ensign, 28 N. Y. 169; Merrick v. Gordon, 20 Id. 93.

[9] Swasey v. Little, 7 Pick. 296.

[10] Cal. Code Civil Proc., sec. 383; Welch v. Kirkpatrick, 30 Cal. 202.

[11] Tay v. Hawley, 39 Cal. 93.

executed in a firm name, who is actually a member of the firm executing the same, or has held himself out as a member so as to give the firm credit on his responsibility. So it would seem, dormant partners not disclosed need not be joined as defendants.[1] All partners are liable for fraudulent representations of one made in the course of partnership business.[2] So a partner is liable to third persons for injuries occasioned by negligence, if committed in the course of the partnership business.[3] In suit to take an account and dissolve a mining partnership, all those owning interests are necessary parties defendant.[4] A partner may be sued at law by his copartner or one who has been such, where the balance has been ascertained by the act of all the partners, and agreed to as constituting such balance.[5]

§ 173. **Actions against Principal and Agent.**—A principal, though himself innocent, is liable for fraud or misconduct of the agent acting within the scope of his authority.[6] But not in matters beyond that scope.[7] And where the principal is known, he alone is liable.[8] But an agent may render himself personally liable by not disclosing the name of his principal.[9] If on the face of an instrument not under seal, executed by an agent with competent authority, by signing his own name simply, it appears that the agent executed it in behalf of the principal, the principal and not the agent is bound.[10] Where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and the purchase avails the purchaser nothing, no legal right of complaint will lie against the agent.[11] The principal and agent are jointly liable for an injury caused by negligence of the agent.[12]

[1] North v. Bloss, 30 N. Y. 374; Wood v. O'Kelley, 8 Cush. 406; Lord v. Baldwin, 6 Pick. 352; see also N. Y. Dry Dock Co. v. Treadwell, 19 Wend. 525; Clarkson v. Carter, 3 Cow. 84; Clark v. Miller, 47 Barb. 628; Mitchell v. Doll, 2 Hur. & G. 159; Hurlbut v. Post, 1 Bosw. 28.

[2] Griswold v. Haven, 25 N. Y. 595.

[3] Cotter v. Bettner, 1 Bosw. 490.

[4] Settembre v. Putnam, 30 Cal. 490.

[5] Ross v. Cornell, 45 Cal. 183. As to partnerships, general and special, the powers and authority of partners, their mutual obligations and liability, etc., see Civil Code Cal., secs. 2424–2520.

[6] Dwinelle v. Henriquez, 1 Cal. 392; Adams v. Cole, 1 Daly, 147; Hunter v. Hudson River Iron and Machine Co., 20 Barb. 493; Thomas v. Winchester, 2 Seld. 397.

[7] N. Y. Life Ins. and Trust Co. v. Beebe, 3 Seld. 361; see also Mechanics' Bank v. N. Y. and N. H. R. R. Co., 3 Kern. 599; 4 Duer, 570.

[8] Conro v. Fort Henry Iron Co., 12 Barb. 27.

[9] Nason v. Cockroft, 3 Duer, 366; Cabre v. Sturgess, 1 Hilt. 160; Blakeman v. Mackay, Id. 266.

[10] Haskell v. Cornish, 13 Cal. 45; affirmed in Shaver v. Ocean Mining Co., 21 Id. 45; Hall v. Crandall, 29 Id. 571; Love v. S. N. L. W. and M. Co., 32 Id. 654.

[11] Engels v. Heatly, 5 Cal. 186.

[12] Phelps v. Wait, 30 N. Y. 78; Cal. C. C., sec. 2338; and generally in relation to agency, see tit. 9, C. C. of Cal.

§ 174. **Actions for Trespass.**—Generally a trespass committed by several persons acting together creates a several liability; but if the trespass is joint, all the trespassers may be joined.[1] A justice of the peace who issues an execution commanding the arrest of the judgment debtor, and the attorney who procures the execution to be issued, in a case in which both know that the law prohibits an arrest in such action, are jointly liable to the debtor in trespass.[2] Trespass lies against a municipal corporation.[3]

§ 175. **Actions against Trustees.**—In an action to carry out a trust deed, or against a trustee, for breach of trust, all the *cestuis que trust* are necessary parties.[4] But not in an action to set aside a trust deed.[5] A party not a trustee may be joined or not, at the option of the plaintiff.[6] In an action by one of several *certuis que trust* to declare and enforce an implied trust, all who claim to be entitled to a portion of the trust estate are proper parties defendant.[7] But when such share is ascertained, each claimant may sue alone;[8] or for breach of trust.[9] Persons holding funds, and who have always dealt with them as if they were trust funds, are liable for losses occasioned by improper investments, though they did not in fact know who the *cestuis que trust* were.[10] So, where A. was indebted to plaintiff, and conveyed his property to B., to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B., who had accepted it, and B. subsequently conveyed a portion of the property to A., without consideration, it was held that A. was a proper and necessary party to the action.[11]

§ 176. **Persons Severally Liable on Same Obligation or Instrument.**—Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same and separate instruments, may all or any of them be included in the same

[1] Sumner v. Tileston, 4 Pick. 308; Creed v. Hartman, 29 N. Y. 591; Kasson v. The People, 44 Barb. 317; Woodbridge v. Camor, 49 Me. 353. That they may be sued jointly, see King v. Orser, 4 Duer, 431; Waterbury v. Westervelt, 5 Seld. 598; Herring v. Hoppock, 3 Duer, 20; Marsh v. Backus, 16 Barb. 488.

[2] Sullivan v. Jones, 2 Gray, 570.

[3] Allen v. Decatur, 23 Ill. 332.

[4] Colgrove v. Tallmadge, 6 Bosw. 289; Bishop v. Houghton, 1 E. D. Smith, 566; Bank of British N. A. v. Suydam, 6 How. Pr. 379; Johnson v. Snyder, 8 Id. 498.

[5] Russell v. Lasher, 4 Barb. 232; Wheeler v. Wheedon, 9 How. Pr. 293; Scudder v. Voorhis, 5 Sandf. 271; see also Wallace v. Eaton, 5 How. Pr. 99.

[6] Bateman v. Margerison, 6 Hare 499.

[7] Jenkins v. Frink, 30 Cal. 586; West v. Randall, 2 Mason, 181. Armstrong v. Lear, 8 Pet. 52; General Mutual Insurance Company v. Benson 5 Duer, 168.

[8] Smith v. Snow, 3 Madd. 10.

[9] Perry v. Knott, 5 Beav. 293.

[10] Ex parte Norris, L. R., 4 Ch. 280.

[11] Lucas v. Payne, 7 Cal. 92; Shaver v. Brainard, 29 Barb. 25.

action at the option of the plaintiff.[1] This section applies only to written obligations.[2] It applies to bonds, as well as bills of exchange and promissory notes;[3] and to cases of joint and several contracts.[4]

Persons jointly and severally liable may be sued together or separately, at the option of the plaintiff.[5] But in actions on joint and several obligations, an administrator can not be joined with the survivor, because against one the judgment would be *de bonis testatoris*, and against the other *de bonis propriis*.[6] To create a several liability, express words are necessary.[7] In New York, it seems the plaintiff may sue one or all of the obligors of a joint and several bond; but in strictness of law, he can not sue an intermediate number.[8] The practice is, however, different in California, where one or all of any intermediate number may be made defendants, at the option of the plaintiff.[9] So, also, in cases of a promissory note, and mortgage to secure the same.[10] Although the several parties to a bill or note may be sued in one action, yet their being so sued does not make them jointly liable,[11] or joint debtors.[12] The common-law rule, that where defendants are sued on a joint contract, recovery must be had against all or none, is modified by the code.[13] But one of two joint debtors, not served with process, is not a proper party defendant in an action upon the judgment against the party on whom service of process was made.[14] So, where joint debtors reside in different states, they may be sued separately.[15]

[1] California Code C. P., sec. 383; N. Y. Code, sec. 120; Iowa, sec. 2764; Oregon, sec. 36; Idaho, sec. 15; Arizona, sec. 15

[2] Spencer v. Wheelock, 11 Leg. Obs. 329; Tibbits v. Percy, 24 Barb 39.

[3] People v. Hartley, 21 Cal. 585; People v. Love, 25 Id. 530; Brainard v. Jones, 11 How. Pr. 569. As to when the bondholders of bonds issued by a county should be made parties defendant in suit against the county, see Hutchinson v. Barr, 12 Cal. 103; Patterson v. Supervisors of Yuba Co., 12 Id. 106. In Oregon, the sureties on an executor's bond can not be sued until after default in the probate court: Hamlin v. Kenney, Laws of Or., 1866, p. 55.

[4] Humphreys v. Crane, 5 Cal. 173; Stearns v. Aguirre, 6 Id. 176.

[5] Estys v. Donnithorne, 2 Burr. 1190; Eccleston v. Clipsham, 1 Saund. 153; Alfred v. Watkins, 1 C. R. 243; Kelsey v. Bradbury, 21 Barb. 531; Parker v. Jackson, 16 Id. 33; Brainard v. Jones, 11 How. Pr. 569; De Ridder v. Schermerhorn, 10 Barb. 638; Snow v. Howard, 25 Id. 55.

[6] May v. Hanson, 6 Cal. 642.

[7] Brady v. Reynolds, 13 Cal. 31.

[8] Leroy v. Shaw, 2 Duer, 626; Minor v. Mechanics' Bank of Alexandria, 1 Pet. S. Ct. 46; Amis v. Smith, 16 Id. 303; Brainard v. Jones, 11 How. Pr. 569; Loomis v. Brown, 16 Barb. 325; Phalen v. Dingee, 4 E. D. Smith, 379; Allen v. Fosgate, 11 How. Pr. 218.

[9] Lewis v. Clarkin, 18 Cal. 400; see also, People v. Love, 25 Id. 520; Code C. P., sec. 383.

[10] Eastman v. Turman, 24 Cal. 379.

[11] Alfred v. Watkins, 1 Code R. (N. S.) 343.

[12] Kelsey v. Bradbury, 21 Barb. 531; Farmers' Bank v. Blair, 44 Id. 642.

[13] California Code Civil Proc., sec. 989; People v. Frisbee, 18 Cal. 402; Lewis v. Clarkin, 18 Id. 399.

[14] Pay et al. v. Hawley, 39 Cal. 93.

[15] Brown v. Birdsall, 29 Barb. 549.

It seems that different parties, liable for the same sum, but under different contracts, can not be joined in the same action.[1] So held in New York, as to a guaranty written under a promissory note.[2] And that the guarantor can not be sued in the same action with the maker.[3] It was there held, also, that the liability of a purchaser and his guarantor is several.[4] So, also, of a lessee and his surety.[5]

[1] Allen v. Fosgate, 11 How. Pr. 218; Glencoe Mut. Ins. Co. v. Harold, 20 Barb. 298; De Ridder v. Schermerhorn, 10 Id. 638; see, also, Brown v. Curtiss, 2 Comst. 225; Barker v. Cassidy, 16 Barb. 177; White v. Low, 7 Id. 204.

[2] Brewster v. Silence, 4 Seld. 207; affirming S. C., 11 Barb. 144; Kelsey v. Bradbury, 21 Id. 440; Alfred v. Watkins, 1 C. R. (N. S.) 343; Draper v. Snow, 20 N. Y. 331; Church v. Brown, 29 Barb. 486.

[3] Allen v. Fosgate, 11 How. Pr. 213.

[4] Leroy v. Shaw, 2 Duer, 526; Spencer v. Wheelock, 11 L. O. 329; but see Cal. Code C. P., sec. 383, and Civil Code, title "Negotiable Instruments."

[5] Phalen v. Dingee, 4 E. D. Smith, 379.

PART SECOND.

ANALYSIS OF PLEADINGS.

CHAPTER I.

OF PLEADINGS IN GENERAL.

§ 177. Pleadings are defined by the Code of Civil Procedure of California as follows:

The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code.

The only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The demurrer to the answer.

And on the part of the defendant:

1. The demurrer to the complaint;
2. The answer.[1]

The definition given by Chitty[2] is this: "Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense; it is the formal mode of alleging that upon the record, which would be the support of the action or the defense of the party in evidence."

§ 178. **Object of Pleading—The Issue.**—The object of pleading is the production of a material issue between the par-

[1] Secs. 420–422. Similar provisions are found in the codes of all the states, except that in some states a reply to the answer is required in certain cases.

[2] 1 Ch. Pl. 235.

ties; that is, a material matter of law or fact affirmed upon the one side and denied upon the other, and which is the matter disputed between the parties and to be tried or determined by the court or jury. Issues are of two kinds: of law and of fact. An issue of law is raised by a demurrer, which admits the facts stated in the pleading demurred to, and denies that the law applicable to those facts entitles the plaintiff to maintain his action, or that the facts stated in the answer constitute a defense; or points out some defect which in law ought to prevent the party whose pleading is demurred to from obtaining the relief sought in his complaint or answer. As will be seen hereafter, these defects must appear upon the face of the pleading demurred to. An issue of fact is raised: 1. By a denial in the answer of facts stated in the complaint; and, 2. By operation of the code where new matter in the answer is considered as denied by the plaintiff.[1]

§ 179. **Forms of Action Abolished.**—Under the code of California,[2] and in other States which have adopted a similar system of procedure, only one form of civil action exists. By this is meant that the formal distinctions between the different common-law actions, *assumpsit*, debt, covenant, trespass, etc., and also between actions at law and in equity, are swept away.[3] Formerly it was necessary to decide what form of action must be resorted to in order to obtain the relief justified by the facts, and this form of action must be stated in the writ, though briefly, as that the defendant is required to answer the plaintiff "in an action upon promises," or "or in an action of debt," etc., and this form of action must be adhered to in the declaration; so that the pleader was required to decide before he had the writ issued what his form of action must be, and in many cases it was not easy to determine what the form should be; and the consequences of a mistake were serious. So he was required to determine at his peril whether he must resort to a court of law or a court of equity. But now these formal distinctions are taken away, and the pleader is required to state the facts which constitute his cause of action; and whatever relief those facts, being established, may entitle him to, he will obtain whether legal or equitable, or both, or whether they would have made a case in *assumpsit*, debt, case, or other form of common-law action. It was held by the supreme court of California, that

[1] The code of Ohio and some other states requires a replication by the plaintiff to new matter set up in the answer.

[2] California Code of Civil Procedure, sec. 307.

[3] Miller v. Van Tassel, 24 Cal. 458.

"under the code of practice, we have but one system of rules respecting pleadings, which governs all cases both at law and in equity. These rules are clearly laid down in the practice act; and although in construing that act we resort to former adjudications, and the old and well-established principles of pleading at common law, yet the former distinctions which existed between common law and equity pleadings no longer exist."[1]

In the New York Code of Procedure, section 69, the distinctions between actions of law and suits in equity is expressly abolished. In Ohio, Iowa, Nevada, Oregon, Idaho, Arizona Territory, and most of the states and territories of the Union, as well as New York and California, "the distinction in the modes of obtaining relief which formerly characterized the proceedings in courts of law and in equity are abolished," but only as to the forms of actions, and not as to the principles which govern them.[2] In Cole v. Reynolds, 18 N. Y. 74, Harris, J., says: "By the code, the distinctions between actions at law and suits in equity are abolished. The course of proceeding in both classes of cases is now the same. Whether the action depends upon legal principles or equitable, it is still a civil action, to be commenced and prosecuted without reference to this distinction. But while this is so with reference to the form and course of proceeding in the action, the principles by which the rights of the parties are to be determined remain unchanged. The code has given no new cause of action. In some cases parties are allowed to maintain an action who could not have maintained it before, but in no case can such an action be maintained where no action at all could have been maintained before upon the same state of facts. If, under the former system, a given state of facts would have entitled a party to a decree in equity in his favor, the same state of facts now, in an action prosecuted in the manner prescribed by the code, will entitle him to a judgment to the same effect. If the facts are such that, at common law, the party would have been entitled to a judgment, he will, by proceeding as the code requires, obtain the same judgment." "What was an action at law before the code, is still an action founded on legal prin-

[1] Bowen v. Aubrey, 22 Cal. 570; Cor lier v. Schloss, 12 Id. 143; Payne v. Treadwell, 16 Id. 243.

[2] Whitt. Pr. 553; see also, 1 Van Santv. Pl. 39; Nash's O. P. 2; 2 Till. & Sh. 1 · Swann's Pl. 21; Stat. of Iowa, sec. 2608; Traphagen v. Traphagen, 40 Barb. 537; McBurney v. Wellman, 42 Barb. 390; Dunnell v. Ketelt as, 16 Abb. Pr. 205; Van Rensselaer v. Read, 26 N. Y. 568; Denman v. Price, 40 Barb. 219.

ciples; and what was a bill in equity before the code is still a civil action founded on principles of equity.[1]

§ 180. **Distinctions between Legal and Equitable Rights Preserved.** — In adjudications under the New York code, it is held that although the forms of actions at law and in equity are abolished, yet that even in the pleadings, or the manner of stating the facts which constitute plaintiff's cause of action, there is still a broad distinction between cases where legal instead of equitable relief is asked. Following in the same track, the supreme court of California has held, "the distinction between law and equity is as marked as ever, though there is no difference in the form of a bill in chancery and a common-law declaration under our system."[2]

§ 181. **Legal and Equitable Relief Granted in Same Action.** — Legal and equitable relief may be asked for in the same action, but the wrongs suffered must be those arising out of or from one and the same transaction, and which would be consistent with the relief asked.[3] In the case of The Globe Ins. Co. v. Boyle, 21 Ohio St. 119, it was held that an action might be brought to reform a contract, and to recover on said contract so reformed; and if, when reformed, the cause of action would have been a common-law action, then the court will first decide upon the equitable case to reform the contract, and then submit the case to the jury on the contract so reformed. So also when relief is asked for in the alternative.[4] For a party may have such relief as is adapted to his case from the proofs.[5] It will therefore be observed that relief is now administered without reference to the technical and artificial rules of the common law.[6] The prayer of a complaint is not the subject of a demurrer.[7] The intention of the legislature was evidently to adopt a "uniform and complete system,"[8] whereby the old and cumbersome forms of pleading would be dispensed with. Yet the facts constituting plaintiff's cause of action are re-

[1] Nash's Pl. & Pr., vol. 1, p. 4; see also Cal. Code C. P., sec. 307.

[2] Rowe v. Chandler, 1 Cal. 167; Dewitt v. Hayes, 2 Id. 463; Lubert v. Chauviteau, 3 Id. 458; Smith v. Rowe, 4 Id. 6; Wiggins v. McDonald, 18 Id. 127; Howard v. Tiffany, 3 Sandf. 695; 1 Van Santv. Pl. 41.

[3] Gray et al. v. Dougherty, 25 Cal. 266; More v. Massini, 32 Id. 590.

[4] Stevenson v. Buxton 15 Abb. Pr. 352; Barlow v. Scott, 24 N. Y. 40.

[5] White v. Lyons, 42 Cal. 279; Van Beusen v. Young, 29 N. Y. 29; Denman v. Prince, 40 Barb. 219; Hammond v. Cockle, 2 Hun, N. Y., 495; Byxbie v. Wood, 24 N. Y. 610; White v. Madison, 26 Id. 117.

[6] Rowe v. Chandler, 1 Cal. 168; Jones v. Steamship "Cortes," 17 Id. 487; White v. Lyons, 42 Id. 379; Grain v. Aldrich, 38 Id. 514.

[7] Althof v. Conheim, 38 Cal. 230; Hale v. Omaha National Bank, 49 N. Y. 626.

[8] Humiston v. Smith, 21 Cal. 134.

quired to be stated as fully under the new practice as under the old.[1]

§ 182. **Of What Pleadings Consist.**—Pleading consists in alleging facts upon the one side and denying them upon the other.[2] But the facts so alleged always presuppose some rule of law applicable to them.[3] And hence in all complaints, while the law governing the facts and the facts coming within the law, taken together, exhibit the cause of action, yet the facts are expressed, while the law is understood; for it would be of no avail "for either party to state facts of which no principle of law could be predicated in his favor."[4] Therefore the pleader first inquires by reference to the law for a remedy, and if he finds there is no legal remedy, he at once knows there has been no wrong known to the law committed, and that the courts can give no relief. As fictitious issues are by the code abolished,[5] analogies of the old system of pleading are not in all cases a safe guide under the code.[6] Two prominent elements intended in the new system are, that falsehood shall not be put upon the record, and that the pleadings should disclose the facts relied on in support or defense of an action.

§ 183. **Distinction between the Pleadings and the Action.**—The difference between the pleadings and the action is that the pleadings show the nature of the demand, and the defense; or, in common terms, the pleadings are the complaint and answer;[7] while the action is the history of the whole cause, including: 1. The complaint, which names the parties, and states the injury suffered; 2. The process, which brings the party into court to answer as to these injuries; 3. The answer of defendant, which admits, or denies, or avoids, etc.; 4. The trial, wherein the nature of the demand and defense are presented by legal proofs; 5. The judgment, wherein the court allows or refuses the remedy asked; 6. The execution, by which the legal rights of the parties are obtained. It is provided by the code that "the pleading on the part of the plaintiff shall be the complaint, and demurrer to defendant's answer; and on the part of the defendant, the demurrer and answer[8] Since the statutes of our State have in express terms defined what the pleadings are, it requires no reference to the text-books on the

[1] Miller v. Van Tassel, 24 Cal. 463; Conaughty v. Nichols, 42 N. Y. 83, 87.
[2] Buddington v. Davis, 6 How. Pr. 402.
[3] Gould's Pl., secs. 2, 3.
[4] Gould's Pl., sec. 2.
[5] New York Code, sec. 72; Snell v. Loucks, 12 Barb. 385.
[6] Bush v. Prosser, 1 Kern. 347.
[7] 1 Bur. Law Dict. 38.
[8] California Code, sec. 422.

subject for further definition. It is also provided by statute that "when a defendant is entitled to relief, as against the plaintiff alone, or against the plaintiff and co-defendant, he may make a separate statement in his answer of the necessary facts, and pray for the relief sought, without bringing a distinct cross-action;" so that parties litigant may settle all questions of difference between them, so far as is practicable, in one action, and not litigate by piecemeal. Interminable litigation is not favored by our legislature nor by our courts, the decisions being numerous and pointed on this subject. It will be our purpose, therefore, to consider the subject of pleadings herein; reserving the consideration of the action for future chapters, where the various steps will be considered under their appropriate heads.

§ 184. **Facts Only must be Stated.**—In pleading under the code, it is the invariable rule that facts only should be stated.[1] The reasons for the existence of these facts are not to be given, but only the naked facts, disrobed of any circumstance connected with or pertaining to them; and this without inferences or conclusions, arguments, hypothetical statements, or statements of the law, or of the pretenses of the opposite party.

For example: If A. is indebted to B. in the sum of five hundred dollars, state the fact and for what he is indebted; if for work and labor done say so, and aver what it is reasonably worth if there was no special contract, and that the same is due and unpaid, and stop there; if for goods sold and delivered, state that fact, and when, where, and to whom sold, what they are worth and what is due, and stop there; if on a promissory note, state the amount of indebtedness, and that it is upon a promissory note bearing date, etc. (the note is usually copied, but not necessarily so), and that the note has not been paid. Of course, in every case judgment must be demanded for the amount due, stating how much, and for interest if any, and costs. In the first example, for "work and labor done," it is not in general necessary to state how A. happened to work for B., or how B. happened to employ A. Such and other kindred facts might become valuable in the course of the trial as evidence, but not as averments in the pleading. In the second example, "for goods sold," it is not necessary to aver how they were sold, or why they were sold, nor anything further than that they were sold to B. at his request for so much money, and

[1] Green v. Palmer, 15 Cal. 411; Hicks v. Murray, 43 Id. 515; 1 Van Santv. 224; 2 Till. & Shear. 8.

that B. has failed to pay for them. The kind of goods sold, and the price and value of each article, are questions of evidence which need not be stated in the pleading. In the third example it need not be stated that the note was made for a valuable consideration, or that it was made for any consideration. It is presumed to have been made for a consideration, and if it was not really so made the defense will develop the fact. It will be seen, therefore, that the facts must be carefully distinguished from the evidence of the facts, since the latter pertains to the trial and not to the pleadings. Argument is improper in a pleading, and should never be inserted,[1] as a good pleading should be true, unambiguous, consistent, and certain to a common intent, as to time, place, person, and quantity, and not redundant or argumentative.[2]

§ 185. **Conclusions of Law not to be Alleged.**—An allegation of a legal conclusion is one which gives no fact, but matter of law only.[3] Such averments are not tolerated by our practice; the facts from which the conclusions follow must be averred, but not the conclusions. If such conclusions are averred and denied, no issue is raised; if they are not denied, they are not admitted.[4] Examples and illustrations of allegations that have been held to be mere conclusions of law are given in the note.[5] Other instances might be enumerated, but we do not

[1] 1 Van Santv. 355; Steph. Pl. 383.

[2] Boyce v. Brown, 7 Barb. S. C. R. 85; Green v. Palmer, 15 Cal. 414; Gallagher v. Dunlap, 2 Nev. 326; Alderman v. French, 1 Pick. 1; Atwood v. Caswell, 19 Id. 493; Austin v. Parker, 13 Id. 222.

[3] Hatch v. Peet, 23 Barb. 583.

[4] 1 Van Santv. 244; 1 Whitt. Pr. 563; Levinson v. Schwartz, 22 Cal. 229; Lightner v. Menzell, 35 Id 452; Cantine v. Clark, 41 Barb. 629; McGee v. Barber, 14 Pick. 212; White v. Madison, 26 N. Y. 117; Haight v. Child, 34 Barb. 186; Commercial B'k of Rochester v. Rochester, 41 Barb. 341; Butler v. Viele, 44 Id. 166; Carter v. Koezley, 9 Bosw. 583; Campbell v. Taylor, 2 West Coast Rep. 541.

[5] *Arose out of the Transaction.*—That an indebtedness arose out of the transaction is a conclusion of law: Brown v. Buckingham, 11 Abb. Pr. 387.

Assent.—The knowledge and assent of a party is a legal conclusion: Moore v. Westervelt, 2 Duer, 59; 1 Bosw. 357; 21 N Y. 103. So in the case of a promissory note made by a copartner; Kemeys v. Richards, 11 Barb. 312.

Bona Fide Holder and Owner.—That a party is the holder and owner, as of a promissory note: White v. Brown, 41 How. Pr. 282; but see Holstein v. Rice, 15 Id. 2.

Bound.—Whether a carrier is bound to know the contents of a package: Berley v. Newton, 10 How. Pr. 490. That the defendant was "bound to repair:" Casey v. Mann. 5 Abb. Pr. 91. That defendant became, or was lawfully bound by the rendition of a judgment against him: People v. Supervisors, 27 Cal. 655; People v. Commissioners of Fort Edward, 11 How. Pr. 89.

Contrary to Law.—That the defendants have acted contrary to the act (statute) is a conclusion of law: Smith v. Lockwood, 13 Barb. 209.

Control and Management.—That a defendant, as executrix, controls and manages the estate of the deceased, and is responsible therefor: Phinney v. Phinney, 17 How. Pr. 197.

Credit.—That the goods were purchased "on credit," and that the

deem such necessary. If counsel were permitted to aver conclusions of law, pleadings might be valuable as briefs, but worthless as statements of facts, the latter being the only object of pleadings.

"terms of credit" had not expired: Levinson v. Schwartz, 22 Cal. 229.

Due. — That a certain amount is due upon a note: Frisch v. Kaler, 21 Cal. 71; McKyring v. Bull, 16 N. Y. 303; Allen v. Patterson, 3 Seld. 480.

Due and Owing. — That a sum is "due and owing:" Keteltas v. Meyers, 3 E. D. Smith, 83.

Duly. — If "duly" has any clear legal signification, it is a question of law to be determined on the facts: Graham v. Machado, 6 Duer, 517. That the plaintiff was duly appointed chamberlain was held sufficient: Platt v. Stout, 14 Abb. Pr. 178. That plaintiff sued by a guardian duly appointed, if the statement is deemed too general, the proper course is to move to make it definite: Séré v. Coit, 5 Abb. Pr. 482. That the trustees were duly appointed: Conger v. Holliday, 3 Edw. Ch. 570. That the plaintiff was duly authorized to bring the action: Myers v. Machado, 6 Abb. Pr. 198; 14 How. Pr. 149. That a meeting was duly convened would imply that it was regularly convened: People v. Walker, 23 Barb. 305; 2 Abb. Pr. 422. That the location was duly and properly made according to the provisions of an act: People v. Jackson, 24 Cal. 632.

Duty. — That it was or is the "duty" of a party to do or forbear an act is a conclusion: City of Buffalo v. Holloway, 3 Seld. 493; Rex v. Everett, 8 B. & C. 114.

Indebted. — That a party is indebted or remains indebted: Curtis v. Richards, 9 Cal. 33; Wells v. McPike, 21 Id. 215; Chamberlain v. Kaylor, 2 E. D. Smith, 134; Hall v. Southmayd, 15 Barb. 32. Or became indebted: Cal. State Tel. Co. v. Patterson, 1 Nev. 151; Lightner v. Menzell, 35 Cal. 452.

In Violation. — Schenck v. Naylor, 2 Duer, 678.

Lawful Holder. — That one was the "lawful holder:" Beach v. Gallup, 2 N. Y. Code R. 86; but see Taylor v. Corbiere, 8 How. Pr. 387.

Lawful Title and unlawfully withholds: Lawrence v. Wright, 2 Duer, 674; see, however, Walter v. Lockwood, 23 Barb. 230; Walter v. Lockwood, 4 Abb. Pr. 307; Ensign v. Sherman, 14 How. Pr. 439.

Liable. — That one is "liable:" Rex v. Upton-on-Severn, 6 C. & P. 133.

Nearer of Kin. — That a party is "nearer of kin:" Pub. Adm'r v. Watts, 1 Paige, 348.

Necessary Supplies. — That supplies furnished to a vessel are necessary: The Gustavia, Blatchf. & H. 189.

Obligation. — That he had failed to fulfill his obligations: Van Schaack v. Winne, 16 Barb. 95.

Ordinance is Legal. — That an ordinance passed by a municipal corporation is legal: People v. Supervisors, 27 Cal. 655.

Owes. — That the defendant owes the plaintiff the sum before mentioned: Millard v. Baldwin, 3 Gray, 484; Codding v. Mansfield, 7 Id. 272; Hollis v. Richardson, 13 Id. 392.

Owner. — That a party is owner: Adams v. Holley, 12 How. Pr. 340; Thomas v. Desmond, Id. 321; *contra*, Davis v Hoppock, 6 Duer, 256; Walter v. Lockwood, 23 Barb. 2 3; 4 Abb. Pr. 307; McMurray v. Gifford, 5 How. Pr. 14; Bentley v. Jones, 4 How. Pr. 204.

Owner and Holder. — That plaintiff is owner and holder of a note: Poorman v. Mills, 35 Cal. 118, approving Wedderspoon v. Rogers, 32 Cal. 569; Witherspoon v. Van Dolar, 15 How. Pr 266.

Power and Authority. — That a corporation had full power and lawful authority to do a particular act: Branham v. Mayor of San Jose, 24 Cal. 585.

Promised to Pay. — That defendant promised to pay, in the common counts in *assumpsit*, is a mere conclusion of law from the facts stated, and need not be averred under the code: Wilkins v. Stidgers, 22 Cal. 232

Release. — That a party "did execute a release in full:" Hatch v. Peet, 23 Barb. 575. "That a settlement had no reference to this claim, nor was the same in any way released or affected:" Jones v. Phœnix Bk., 4 Seld. 235.

Repeated Acknowledgments. — Bloodgood v. Bruen, 4 Seld. 366.

Right of Possession. — That right of

§ 186. **Defendant's Pretenses, or Facts Anticipating a Defense.** — Allegations in a complaint as to the defendant's pretenses are improper, as they are not the facts of the plaintiff's case.[1] So, also, facts anticipating a defense ought never to be averred. If such an averment is made in the complaint, the defendant need not traverse it. What is material in the case may be quite immaterial in the pleading. The complainant should not erect a structure, and, to show its stability, attempt, but fail, in knocking it down. The plaintiff may be well aware of the defense which will be interposed, but the defendant will be quite as capable of presenting it as the plaintiff. The real effect of such pleading, if allowed, would be to put the opposite party on the stand as a witness, without being obliged to take his whole statement as true.[2] The above is the general rule, but there are exceptions; such as where the original indebtedness is counted on, and then the defense of payment anticipated by allegations of matters of fraud in answer.[3] An allegation that defendant was of full age when he executed the bond is the allegation of a fact in anticipation of a defense.[4] So in New York it has been held that in a complaint upon a cause of action which accrued more than six years previous to

possession was forfeited by non-compliance with rules and customs: Dutch Flat v. Mooney, 12 Cal 434.

Sole Owner. — That a party is sole owner: Thomas v. Desmond, 12 How. Pr. 321; see, however, Holstein v. Rice, 15 Id. 1.

Subject to Mortgage. — That defendant took land subject to mortgage: Wormouth v. Hatch, 33 Cal. 121.

Title to Money. — That plaintiff is entitled to the sum of money demanded: Drake v. Cockroft, 1 Abb. Pr. 203.

Trust. — That by the laws of the state a trust was created: Throop v. Hatch, 3 Abb. Pr. 25.

Undertake to Deliver. — "That he did not, by his agreement, undertake to deliver the land from all incumbrances:" Warner v. Hatfield, 4 Blackf. 394.

Unjust Refusal. — That a refusal is unjust, is a conclusion of law: Re Prime, 1 Barb. 352.

Validity. — That a note never had any validity: Burrall v. Bowen, 21 How. Pr. 378. What is the meaning of validity and effect of a contract? Latham v. Westervelt, 26 Barb. 256; Chapin v. Potter, 1 Hilt. 366.

Were Discontinued. — That actions were discontinued is a conclusion of law: Hatch v. Peet, 23 Barb. 583.

Wrongfully and Unlawfully, when used in connection with issuable facts, are surplusage, and had better be omitted: Halleck v. Mixer, 16 Cal. 574; Payne v. Treadwell, 16 Cal. 220; Lay v. Neville, 25 Id. 545; People v. Supervisors, 27 Id. 655; Richardson v. Smith, 29 Id. 529; Miles v. McDermott, 31 Id. 271; People ex rel. Haws v. Walker, 2 Abb. Pr. 421; Fletcher v. Calthrop, 1 New Mag. Cas. 541; Ensign v. Sherman, 13 How. Pr. 37; Kinsey v. Wallace, 36 Cal. 463; and Feely v. Shirley, 43 Id. 369.

[1] 1 Whitt. Pr. 542; Steph. Pl. 349; Green v. Palmer, 15 Cal. 414; Van Nest v. Talmadge, 17 Abb. Pr. 99; Hotham v. E. I. Comp., 1 T. R. 638.

[2] Gould's Pl. 75; Canfield v. Tobias, 21 Cal. 349; Green v. Palmer, 15 Id. 414; Kerr v. Blodgett, 16 Abb. Pr. 137; Giles v. Betz, 15 Id. 285; Van Demark v. Van Demark, 13 How. Pr. 372.

[3] Bracke v. Wilkinson, 13 How. Pr. 102; see, also, Wade v. Rusher, 4 Bosw. 537; and Thompson v. Minford, 11 How. Pr. 273.

[4] Walsingham's Case, Plow. 564; Bovy's Case, 1 Vent. 217; Stowell v. Zouch, Plow. 376.

the commencement of the suit, an allegation, inserted for the purpose of anticipating the defense of the statute of limitations, that "the defendants have not resided in the state at any time within six years," etc., was irrelevant and should be stricken out.[1] But it is otherwise in California.[2]

§ 187. **Facts Independent of the Cause of Action.**—Facts independent of the cause of action and proper to the affidavit, accompanying a pleading, as in cases of arrest, should not be alleged.[3] So, of facts in relation to a contemporaneous agreement in writing varying the terms of a promissory note.[4]

§ 188. **Implications and Presumptions of Law.**—Where the law presumes a fact, the same need not be stated in the pleading.[5] Thus matters of which the court takes judicial notice need not be alleged;[6] or notice *ex officio*, as of a public statute.[7] But ordinances of a municipal corporation are not judicially noticed, and must be alleged.[8] Further illustrations of facts which are presumed, and consequently need not be alleged, are given in the note.[9]

[1] Butler v. Mason, 5 Abb. Pr. R. 40.

[2] See Keller v. Hicks, 22 Cal. 457; Brennan v. Ford, 46 Id. 7; Canfield v. Tobias, 21 Id. 350.

[3] Sellar v. Sage, 12 How. Pr. 531; 13 Id. 230; Frost v. M'Carger, 14 Id. 131; Secor v. Roome, 2 N. Y. Code R. 1; *contra*, Barber v. Hubbard, 3 Id. 156.

[4] Smalley v. Bristol, 1 Mann. (Mich.) 153.

[5] 1 Chitt. 220; 4 M. & S. 120; 2 Wils. 147; Steph. on Pl. 352; 1 Whitt. 591; Partridge v. Badger, 25 Barb. 146; Tileston v. Newell, 13 Mass. 406; Dunning v. Owen, 14 Id. 157; McGee v. Barber, 14 Pick. 212; Marsh v. Bulteel, 5 Barn. & Ald. 507; Frets v. Frets, 1 Cow. 335; Allen v. Watson, 16 Johns. 205; Vymor's Case, 8 Rep. 81; Bac. Abr., Pleas, i. 7; 2 Sand. 305; Sheers v. Brooks, 2 H. Bl. 120; Hanford v. Palmer, 2 Brod. & B. 361; Wilson v. Hobday, 4 M. & S. 125; Chapman v. Pickersgill, 2 Wils. 147.

[6] Goulett v. Cowdry, 1 Duer. 139.

[7] 1 Sandf. 262; Steph. Pl. 345; Golet v. Cowdrey, 1 Duer, 139.

[8] Harker v. Mayor of N. Y., 17 Wend. 199.

[9] *Agency.*—That presentation of note by a bank was "as agents" for plaintiff and not as owners, is presumed: Farmers' and Mechanics' Bank of Genesee v. Wadsworth, 24 N. Y. 547.

Consideration.—A promissory note imports a consideration, and in an action thereon none need be alleged: Allen v. Carpenter, 1 West Coast Rep. 598; Orr v. Hopkins, Id. 157.

Death of Ancestor.—The allegation that one is heir of A. implies the death of A., for *nemo est hæres viventis:* Broom's Leg. Max. 393. Though the term "heir" may denote heir apparent: Lockwood v. Jesup, 9 Conn. 272; Cox v. Beltzhoover, 11 Mo. 142.

Delivery of a Specialty.—The delivery of a specialty, though essential to its validity, need not be stated in a pleading: 1 Ch. Pl. 364; Cabell v. Vaughan, 1 Saund. 291; Chappell v. Bissell, 10 How. Pr. 274; 12 Id. 452; Prindle v. Caruthers, 15 N. Y. 425; Lafayette Ins. Co. v. Rogers, 30 Barb. 491.

Incorporation.—In New York, that a business corporation made and delivered its promissory note, sufficiently states a valid contract. A legal consideration may be presumed: Lindsley v. Simonds, 2 Abb. Pr. (N. S.) 69; Wood v. Wellington, 30 N. Y. 218; Phœnix Bank of New York v. Donnell, 41 Barb 571.

In Writing.—Averment of acceptance implies "in writing:" Bank of Lowville v. Edwards, 11 How. Pr. 216.

Jurisdiction.—The jurisdiction of a court of record of a sister state will

§ 189. **Material Averments.**—A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.[1] There is no question of more importance to the pleader than what is and what is not a material allegation; or, in other words, what is necessary to be stated in a pleading, and what ought to be omitted. In the case of Green v. Palmer, 15 Cal. 414, this question is elaborately discussed; and the true rule is there laid down in the clearest and most logical manner.[2]

be presumed. It is sufficient to allege that judgment was duly recovered: Halstead v Black, 17 Abb. Pr. 227. So, also, of all courts, officers, and boards: Cal. Code C. P., sec. 456.

Non-payment.—That defendant has not paid is implied in the allegation that there is due and owing, etc.: Keteltas v. Meyers, 19 N. Y. 233; Holeman v. DeGray, 6 Abb. Pr. 79. In the case of Keteltas v. Meyers, *supra*, a copy of the note sued on was set out in the complaint, and the fact that the note was due appeared therefrom; and the complaint, instead of alleging that so much was unpaid thereon, alleged that a certain sum (the amount of the note) was "due and owing thereon." *Held*, that it was equivalent to an averment that that amount remained unpaid. If, however, the complaint had simply averred the making and delivery of the note, without stating when the same matured, the allegation that it was "due" would be a mere conclusion of law: Roberts v. Treadwell, 50 Cal. 520.

Official Capacity of executor is implied: Serantom v. Farmers' and Mechanics' Bank, 24 N. Y. 424.

Ownership.—Possession of negotiable paper indorsed in blank by the payee thereof, is *prima facie* evidence of ownership: Bedell v. Carll, 33 N. Y. 581; Brainerd v. New York & Harlem R. R. Co., 10 Bosw. 332.

Promise.—In a great many cases where a legal obligation exists, the law will imply a promise. This has been stated to be an inference or conclusion of law from the legal liability: Gould's Pl. 530; but the report in Kinder v. Paris, 2 H. Bl. 562, says, that from the antecedent debt or duty, the law presumes the defendant did in fact promise to pay, and Lord Holt is reported to have said that there was no such thing as promise in law: Parkins v. Wollaston, 6 Mod. 131. So a sale of goods or loan of money necessarily implies a promise, and a consideration, and a mutual contract: See notes to Osborne v. Rogers, 1 Saund. 264; Victor v. Davies, 1 M. & W. 758; Emery v. Fell, 2 T. R. 28; Glenny v. Hitchins, 4 How. Pr. 98. And the law makes no distinction between an implied promise and an express promise: Kinder v. Paris, 2 H. Bl. 563; Chit. Con. 19. See discussion on this subject of promise in Hall v. Southmayd, 15 Barb. 34–36; see also Cropsey v. Sweeney, 27 Id. 310; Farron v. Sherwood, 17 N. Y. 230; Berry v. Fernandes, 17 Bing. 338; Durnford v. Messiter, 5 Man. & S. 446.

Proportion of Liability of Surety. The proportion that a surety has to pay is implied: Van Denmark v. Van Denmark, 13 How. Pr. 372.

Public Officer.—In a suit by a public officer in his name of office, his due appointment thereto is implied: Fowler v. Westervelt, 40 Barb. 374.

Statute.—As to implications arising in actions brought under a statute, see Freeman v. Fulton Fire Ins. Co., 38 Barb. 247; Washburn v. Franklin, 35 Id. 599; 7 Abb. Pr. 8; Merwin v. Hamilton, 6 Duer, 218; Teel v. Fonda, 4 Johns. 304.

[1] Cal. Code, sec. 463; Oregon Code, sec. 98.

[2] In Green v. Palmer, 15 Cal. 414, Field, C. J., formulated the following rules in regard to pleadings under the code: "First rule. Facts only must be stated. This means the facts as contradistinguished from the law, from argument, from hypothesis, and from evidence of the facts. The facts must be carefully distinguished from the evidence of the facts. The criterion to distinguish the facts from the evidence is—Second rule. Those facts, and those alone, must be stated which constitute the cause of action, the

The following questions will decide in most cases whether an allegation be material: Can it be made the subject of a material issue?[1] Or, if it be denied, will the failure to prove it decide the case in whole or in part?[2] Such material averment can not be presumed from the existence of other facts.[3]

§ 190. **Essential Facts Only are Material.**—What facts are essential is sometimes a question which puzzles the pleader, yet it should not. The following tests will determine whether certain allegations are unnecessary: 1. Can the allegations be stricken from the pleading without leaving it insufficient? 2. Can it be stricken from the pleading without impairing any portion of the cause of action or defense? 3. Can it be stricken from the pleading without an injury to the plaintiff or a benefit

defense, or the reply. Therefore (1) each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. The plaintiff, on his part, must allege all that he will have to prove to maintain his action; the defendant, on his part, all that he must prove to defeat the plaintiff's title, after the complaint is admitted or proved. (2) He must allege nothing affirmatively which he is not required to prove. This is sometimes put in the following form, viz.: 'That those facts, and those only, should be stated which the party would be required to prove.' But this is inaccurate, since negative allegations are frequently necessary, and they are not to be proven. The rule applies, however, to all affirmative allegations, and, thus applied, is universal. Every fact essential to the claim or defense should be stated. If this part of the rule is violated, the adverse party may demur. In the second place, nothing should be stated which is not essential to the claim or defense; or, in other words, none but 'issuable' facts should be stated. If this part of the rule be violated, the adverse party may move to strike out the unessential parts. An unessential, or what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient, and, of course, need not be proved or disproved. The following question will determine in every case whether an allegation be material: Can it be made the subject of a material issue? In other words, if denied, will the failure to prove it decide the case in whole or in part? If it will not, then the fact alleged is not material; it is not one of those which constitute the cause of action, defense, or reply." See also, to the same effect, Dreux v. Domec, 18 Cal. 88; Smith v. Richmond, 19 Id. 483; Bowers v. Aubrey, 22 Id. 569; Grewell v. Walden, 23 Id. 169; O'Connor v. Dingley, 26 Id. 11; Johnson v. Santa Clara Co., 28 Id. 547; Larco v. Casaneuava, 30 Id. 565; Willson v. Cleaveland, Id. 200; Patterson v. Keystone M. Co., Id. 364; Racouillat v. Rene, 32 Id. 456; Jones v. Petaluma City, 36 Id. 233; Joseph v. Holt, 37 Id. 255; Bruck v. Tucker, 42 Id. 351; Cline v. Cline, 3 Or. 359; Perkins v. Barnes, 3 Nev. 565; McNabb v. Wixom, 7 Id. 172; Clark v. Bates, 1 Dakota, 42; Clay Co. v. Simonsen, 1 Id. 403, 430; Scott v. Robards, 67 Mo. 289; Dunn v. Remington, 9 Neb. 82; Ingle v. Jones, 43 Iowa, 286; Louisville, etc., Canal Co. v. Murphy, 9 Bush, 522; Pfiffner v. Krapfel, 28 Iowa, 27; De Graw v. Elmore, 50 N. Y. 1; Pier v. Heinrichoffen, 52 Mo. 333; Horn v. Ludington, 28 Wis. 81; Hill v. Barrett, 14 B. Mon. 67; People v. Ryder, 12 N. Y. 433; Rogers v. Milwaukee, 13 Wis. 610; Bird v. Mayer, 8 Id. 363; Groves v. Tallman, 8 Nev. 178; Wills v. Wills, 34 Ind. 106; Cowin v. Toone, 31 Iowa, 513; Singleton v. Scott, 11 Iowa, 589; Campbell v. Taylor, 2 West Coast Rep. 541.

[1] Green v. Palmer, 15 Cal. 414; Martin v. Kanouse, 2 Abb. Pr. 330; Mussina v. Clark, 17 Id. 188; Cahill v. Palmer, Id. 196.

[2] Green v. Palmer, 15 Cal. 414.

[3] 1 Van Santv. 773, 774; Hall v. Southmayd, 15 Barb. 34, 35; Van de Sande v. Hall, 13 How. Pr. 458.

to the defendant, however remote this injury or benefit may be?[1]

The essential facts only should be averred; for, should the pleadings be so framed that even the least important essential fact is left out, the cause of action is impaired. What plaintiff ought to aver and what he must prove are, we repeat, entirely distinct propositions. If the pleader were required to aver every fact necessary to prove his case, most pleadings would be of great length. The pleadings should be concise and to the point. "There never was a greater slander upon the code than that it permits long pleadings."[2] It is only ultimate facts that are to be alleged, and not the facts which tend to prove or establish the existence of the ultimate facts. For example: Plaintiff sues for goods sold and delivered; defendant denies the sale and delivery. The plaintiff must then prove the facts which show the sale and delivery.

§ 191. **Immaterial, Irrelevant, and Redundant Matter.** Irrelevant, immaterial, unessential, redundant, and surplus allegations should be omitted from a pleading.[3] Such allegations or denials present no issue.[4] And if such matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby.[5] Irrelevant matter in a pleading is that which has no bearing on the subject-matter of the controversy.[6] Surplusage is matter altogether superfluous and useless, and which may be rejected by the court, and the pleadings stand as if it were stricken out or had never been inserted.[7] Thus, a false construction in law upon the terms of a contract will be regarded as surplusage, and, on motion, will be stricken out.[8] Or superfluous matter when inserted by itself.[9] So, when the name of the wife is improperly or unnecessarily joined with that of her husband, it may be regarded as surplusage.[10] So of inconsistent allegations.[11] Or allegations which are absurd, or the

[1] Van Santv. 319, 320; Whitwell v. Thomas, 9 Cal. 499; Green v. Palmer, 15 Id. 414, and cases cited in last note.

[2] Green v. Palmer, 15 Cal. 417.

[3] Green v. Palmer, 15 Cal. 414.

[4] 1 Van Santv. 76; Maretzek v. Caldwell, 19 Abb. Pr. 35.

[5] Cal. Code, sec. 453; Nevada, sec. 57; Idaho, sec. 57; Arizona, 57; N. Y. Code, sec. 160; Oregon, sec. 84; Larco v. Casaneuava, 30 Cal. 560; Boles v. Cohen, 15 Id. 150; Hampshire Manuf. Bank v. Billings, 17 Pick. 87; Lord v. Tyler, 14 Id. 156; Cahill v. Palmer, 17 Abb. Pr. 196; Moffatt v. Pratt, 12 How. Pr. 48.

[6] Fabricotti v. Launitz, 1 Code R. (N. S.) 121; Stafford v. Mayor of Albany, 6 Johns. 1; Van Renssalaer v. Brice, 4 Paige Ch. 177; Perrine v. Farr, 2 Zab. 356; Lee Bank v. Kitching, 11 Abb. Pr. 435; Cahill v. Palmer, 17 Id. 196.

[7] Gould's Pl. 143.

[8] Stoddard v. Treadwell, 26 Cal. 294.

[9] 1 Van Santv. 311; Boles v. Cohen, 15 Cal. 150.

[10] Warner v. Steamer "Uncle Sam" 9 Cal. 697.

[11] 1 Van Santv. 353, 519; Uridias v. Morrill, 25 Cal. 81; Klink v. Cohen, 13 Id. 623.

truth of which is impossible.[1] So of allegations which are redundant, although the facts averred are relevant, as by a needless repetition even for material averments.[2]

Any matter which may tend to limit or qualify the degree of certainty, is redundant matter or surplusage; for example, matter of mere evidence, legal conclusions, things within judicial notice, matter coming more properly from the other side, or matter necessarily implied.[3] Though in its more strict and confined meaning, redundancy imports matters wholly foreign and irrelevant.[4]

Conclusions of law inserted in a pleading may be considered as mere surplusage.[5] So of evidence when inserted in a pleading.[6] Or probative facts, such as averments of deraignment of title.[7] Or hypothetical statements.[8]

Matter inserted in a pleading obnoxious from uncertainty, as where the facts which constitutes the cause of action is not stated clearly, will be considered as surplusage.[9] So of matter contained in a pleading, which is frivolous.[10] Or allegations ambiguous or repugnant to each other.[11] Or a commingled statement of two causes of action that may properly be united in one complaint.[12] But such pleading may be demurred to for ambiguity or uncertainty.[13] Or the names of parties improperly joined, may be stricken out.[14]

But a material allegation can not be stricken out, because the pleader also claims relief which can not be granted.[15] Nor where the information required was obtainable by demand of

[1] Sacramento Co. v. Bird, 31 Cal. 66.

[2] 1 Ch. Pl. 227; Dundass v. Lord Weymouth, Cowp. 665; Barstow v. Wright, Doug. 668; Bowman v. Sheldon, 5 Sand. 660; Rost v. Harris, 12 Abb. Pr. 446; Benedict v. Seymour, 6 How. Pr. 303; Clough v. Murray, 19 Abb. Pr. 97.

[3] Steph. Pl. 423.

[4] Steph Pl. 422; Barstow v. Wright, Doug. 667; 1 Saund. 233; Yates v. Carlisle, 1 Black. 270; Plowd. Com. 232; Lord v. Houston, 11 East, 62; Cobbett v. Cochrance, 8 Bing. 17; Bacon v. Ashton, 5 Dowl. 94; Palmer v. Gooden. 8 M. & W. 890; Stevens v. Bigelow, 12 Mass. 438; Hampshire Manf. Bank v. Billings, 17 Pick. 87; Simpson v. McArthur, 13 Abb. Pr. 302, note.

[5] Halleck v. Mixer, 16 Cal. 574.

[6] Green. v. Palmer. 15 Cal. 414; Bowen v. Aubrey, 22 Id. 566.

[7] Larco v. Casaneuava, 30 Cal. 560; Wilson v. Cleaveland, Id. 192.

[8] See *ante;* 1 Van Santv. 358; Green v. Palmer, 15 Cal. 414; Wies v. Fanning, 9 How. Pr. 543; Brown v. Rickman, 12 Id. 313.

[9] Arrietta v. Morrissey, 1 Abb. Pr., N. S. 439.

[10] Smith v. Countryman, 30 N. Y. 655; Lockwood v. Salhenger, 18 Abb. Pr. 136; Van Valen v. Lapham, 13 How. Pr. 240.

[11] 1 Ch. Pl. 377; 1 Van Santv. 354; Com. Dig. (C. 23); Bac. Abr., Pleas, i. 4; Vin. Abr., Abatement; Sibley v. Brown, 4 Pick. 137; Wyatt v. Aland, 1 Salk. 324; Nevill v. Soper, Id. 213; Butt's Case, 7 Rep. 25; Hutchinson v. Jackson, 2 Lut. 1324; Hart v. Longfield, 7 Mod. 148; Byass v. Wylie, 1 C. M. & R. 686.

[12] 1 Van Santv. 344; Harsen v. Bayaud, 5 Duer, 656.

[13] California Code, sec. 430.

[14] Yeates v. Walker, 1 Duval (Ky.), 84.

[15] Woodgate v. Fleet, 9 Abb. Pr. 222.

particulars.[1] Nor to obtain details as to contents of a lost instrument, of which the nature and effect have been stated.[2]

If the immaterial matter constitute part of a material averment, so that the whole can not be stricken out without destroying the right of action or defense of the party, it can not be rejected as surplusage, but may be traversed in the pleading, and must be proved as laid, though the averment be more particular than need be. The true rule is that whenever the whole allegation can be stricken out without affecting the legal right set up by the party, it is impertinent, and may be rejected as surplusage.[3] An entire pleading can not be stricken out as irrelevant or redundant.[4]

§ 192. **Only Such Facts as Constitute a Cause of Action, Defense, or Reply, must be Stated.**—As has been shown in preceding sections, only such essential facts as constitute the cause of action, the defense, or the reply, must be stated in the pleading. Each party must allege what he is required to prove, and he will be precluded from proving any fact essential to his cause of action or defense not alleged.[5] In addition to the foregoing, it is a cardinal rule of pleading under the code, as indeed it was at the common law and in equity, that the allegations and proofs must correspond, and substantially conform to and sustain each other. Otherwise there would be a variance which would be fatal to a recovery.[6] But an allegation in a pleading does not estop the party pleading it from proving that the allegation is not correct, unless the allegation is made an issuable fact.[7] In pleading, it is the ultimate

[1] Crockroft v. Atlantic Mut. Ins. Co., 9 Bosw. 681.

[2] Kellogg v. Baker, 15 Abb. Pr. 286.

[3] United States v. Burnham, 1 Mason, 57; Wyman v. Fowler, 3 McLean, 467.

[4] Benedict v. Dake, 6 How. Pr. 352; Nichols v. Jones, Id. 355; Hull v. Smith, 8 Id. 281; Howell v Knickerbrocker Life Ins. Co., 24 How. Pr. 475; Blake v. Eldred, 18 How. Pr. 240. For practice on remedy by striking out, see Amendments, vol. 2.

[5] 1 Van Santv. 774; 1 Ch. Pl. 214; Green v. Palmer, 15 Cal. 414; Willson v. Cleaveland, 30 Id. 192; Hicks v. Murray, 43 Id. 522; Freeman v. Fulton Fire Ins. Co., 38 Barb. 247; Dolcher v. Fry, 37 Id. 152; Barnes v. Quigley, 59 N. Y. 265; Peck v. Root, 5 Hun. 547; Decker v. Saltsman, 1 Id. 421; Hicks v. Murray, 43 Cal. 515; Gates v. Lane, 44 Id. 392.

[6] McKinlay v. Morrish, 21 How. U. S. 343; Campbell v. The "Uncle Sam," 1 McAll. 77; Kramme v. The "New England," Newb. 481; 1 Greenleaf, 18; 1 Whitt. Pr. 575; Hicks v. Murray, 43 Cal. 515. In cases where complaint was deficient, see Cowenhoven v. City of Brooklyn, 38 Barb. 9; Van Zandt v. Mayor of N. Y., 8 Bosw. 375; Solms v. Lias, 16 Abb. Pr. 311; Bailey v. Johnson, 1 Daly, 61; Curtiss v. Marshall, 8 Bosw. 22. In cases where answer was deficient, see Raynor v. Timerson, 46 Barb 518; Allen v. Mercantile Mar. Ins. Co., 46 Barb. 642; Bruce v. Kelley, 39 N. Y. (7 J. & Sp.) 27; Smith v. Smith, 60 N. Y. 161.

[7] Patterson v. The Keystone Mining Co., 30 Cal. 360. As to what is a variance, when material, etc., see also Knapp v. Roche, 37 N. Y. Superior Ct. (5 J. & Sp.) 395; Hauck v. Craig-

and not the probative facts which should be averred, and it is error in the court to exclude evidence offered to establish the probative facts, although they are not averred in the pleading.[1] For example: title of plaintiff is an ultimate fact in ejectment, while the facts established by plaintiff going to support such title are probative facts.[2]

The expression "facts constituting a cause of action" means those facts which the evidence upon the trial will prove, and not the evidence required to prove their existence.[3] They have been variously called physical facts,[4] or issuable facts,[5] or real, traversable facts.[6] As before stated, facts and not evidence should be alleged. In other words, it is not necessary in alleging a fact to state such circumstances as merely tend to prove the truth of the fact.[7]

§ 193. **What should be Omitted.**—Nothing should be alleged affirmatively which is not required to be proved.[8] For it is the intention of the code to require the pleadings to be so framed as not only to apprise the parties of the facts to be proved, but to narrow the proofs on the trial,[9] the rule being that the allegations and the proofs must correspond.[10] And allegations merely formal, *i. e.*, such as require no proof at the trial, are unnecessary.[11] And this is the reason why it is not necessary to aver that a note was given for a "valuable consideration," or, in an action for damages for assault and battery, that A. "wrongfully and unlawfully" beat B., or, in an action for libel, for a publication which is libelous *per se*, that it was published "falsely and maliciously;" for it was of course false, or it would not be libelous, and malice will be presumed when the falsehood is shown. But where a consideration is not im-

head, 4 Hun, 561; Sussdorf v. Schmidt, 55 N. Y. 319; Boynton v. Boynton, 43 Howard, 380; Beard v. Yates, 2 Hun, 466; Degraw v. Elmore, 50 N. Y. 1; Dudley v. Scranton, 57 N. Y. 424; Barnes v. Quigley, 59 N. Y. 265; Cal. Code C. P., secs. 469–471; Farnsworth v. Holderman, 3 West Coast Rep. 342; State v. Roe, 1 Id. 502; Orr v. Hopkins, Id. 157.

[1] Grewell v. Walden, 23 Cal. 165; Moore v. Murdock, 26 Cal. 514; Miles v. McDermot, 31 Id. 271; Depuy v. Williams, 26 Id. 313; Marshall v. Shafter, 32 Id. 176; See v. Cox, 16 Mo. 166; Sanders v. Anderson, 21 Id. 402.

[2] Marshall v. Shafter, 32 Cal. 176.

[3] Wooden v. Strew, 10 How. Pr. 50; Dows v. Hotchkiss, 10 N. Y. Leg. Obs. 281; Carter v. Koezley, 14 Abb. Pr. 150; Cahill v. Palmer, 17 Id. 196.

[4] Lawrence v. Wright, 2 Duer, 674; see Drake v. Cockroft, 1 Abb. Pr. 203.

[5] Green v. Palmer, 15 Cal. 416.

[6] Mann v. Morewood, 5 Sandf. 557.

[7] Steph. Pl. 342.

[8] Green v. Palmer, 15 Cal. 414; Decker v. Mathews, 2 Kern. 320; Bank of U. S. v. Smith, 11 Wheat. 171; Haskell v. Village of Penn Yan, 5 Lans. 43.

[9] Piercy v. Sabin, 10 Cal. 22.

[10] Maynard v. F. F. Ins. Co., 34 Cal. 48.

[11] Ensign v. Sherman, 14 How. Pr. 439; Biggerstaff v. Briggs, 3 West Coast Rep. 353.

plied, or a request is essential to the defendant's liability, it must be specially averred in the pleading.[1]

The only exception to this rule is to negative a possible performance of the obligation which is the basis of the action, or to negative an inference from an act which is in itself indifferent.[2] What is inserted in a pleading must be decisive of some part of the cause, one way or the other.

§ 194. **Mode of Stating Facts.**—The facts in a pleading should be stated: 1. In their logical order; 2. By direct averment; 3. In ordinary and concise language; 4. With reasonable certainty. These several rules will be considered in the order in which they are mentioned.

§ 195. **Facts should be Stated Logically.**—By "logical order" is meant "natural order."[3] It is laid down as an essential prerequisite that logical order should be observed in the statement of facts in the pleading.[4] The California code, section 426, provides that the complaint shall contain "a statement of the facts constituting the cause of action in ordinary and concise language." It may be observed that, in erecting a building, the architect does not commence at the top, but at the base, placing each part of his foundation in its proper position, in such a manner that it may not have to be removed or reconstructed. So, in framing a pleading it must be remembered that we are making a statement of certain facts which we relate in the order of their occurrence, and the complete narration must be made in concise language and with sufficient certainty, thus constituting the superstructure of the entire transaction. Should we commence at the wrong end of the story, we would be building without a foundation, and the pleading would be unintelligible; or should we relate only the latter part of the transaction, however just or plausible might be our statements, still we would not have stated a cause of action, for there would not be a complete and connected statement of the transaction.

It has been held that facts should be stated according to their legal effect.[5] But authorities in states having a code are quite

[1] Spear v. Downing, 12 Abb. Pr. 437; Orr v. Hopkins, 1 West Coast Rep. 157; Alden v. Carpenter, Id. 593.

[2] Green v. Palmer, 15 Cal. 411; Payne v. Treadwell, 16 Id. 244.

[3] Green v. Palmer, 15 Cal. 414.

[4] 1 Ch. Pl. 231; Gould's Pl. 4; 2 Till. & Shear. 8.

[5] Gould's Pl. 145; Bac. Abr., i. 7; Co. Litt. 193; Com. Dig. Pl. 37; 2 Saund. 96; Cowp. 600; Cro. Eliz. 352; Doug. 667; 2 Salk. 574; 1 Ld. Raym. 400; Lawes Pl. 62; 1 T. R. 446; Steph. Pl. 389; Boyce v. Brown, 7 Barb. 85; Pattison v. Taylor, 1 N. Y. Code R. 175; 8 Barb. 250; Dollner v. Gibson, 3 N. Y. Code R. 153; Coggill v. Amer. Ex. Bank, 1 Comst. 117; Stewart v. Travis, 10 How. Pr. 153; Bennett v. Judson, 21 N. Y. 240; Barker v. Lade, 4 Mod. 150; Howell v. Richards, 11 East, 633.

as numerous the other way. In some cases it has been held that facts should be stated as they actually occurred or exist.[1] In other cases it is held that facts may be alleged either way. Thus, it seems that an act done by an agent may be alleged as the act of the principal, which is the legal effect of the fact, or it may be alleged as the act of the agent, done as agent of the principal.[2]

It is evident, however, that pleading facts according to their legal effect is, in most cases, necessary to conciseness, which is one of the requirements of code pleading, and is not, we think, in conflict with any of the requirements of the code. The rule, it is true, has more special application to deeds and other writings, but is not restricted to them; but, under some circumstances, may extend to all matters and transactions which a party may be required to allege in pleading; as where a fact necessarily embraced or implied certain other facts which were but the evidences of the material fact, it is sufficient to allege the legal or material fact.[3] This rule, indeed, in many cases, can scarcely be distinguished from that which requires ultimate facts to be stated and not the evidence of them. Take, for example, an action for personal injury resulting from negligence; it was and still is sufficient for the plaintiff to allege in general terms that the injury complained of was occasioned by the carelessness and negligence of the defendant, without stating the circumstances, in order to show that it was occasioned by negligence.[4] But care must be taken not to confound pleading facts according to their legal effect, and pleading mere conclusions of law; the one is still a fact, while the other is not.

The converse of the rule above stated is equally true.[5] In one case the court said: "But facts are not to be, or at least need not be, separated entirely from the law by the pleader; nor could they be without great and most damaging prolixity. In this, as well as in most things, theory and practice are compelled to meet each other half way for the sake of attainable good. The last analysis between fact and law is usually made by the judge at the trial."[6]

[1] Ives v. Humphreys, 1 E. D. Smith, 196; Lee v. Ainslee, 4 Abb. Pr. 463; Smith v. Leland, 2 Duer, 509; Farron v. Sherwood, 17 N. Y. 227, and many other cases.

[2] See Bennett v. Judson, 21 N. Y. 240; Dollner v. Gibson, 3 Code R. 153; Barney v. Worthington, 4 Abb., N. S., 205.

[3] See Shaw v. Jayne, 4 How. Pr. 119.

[4] Chiles v. Drake, 2 Metc. (Ky.) 146; Kountz v. Brown, 16 B. Mon. 582; 2 Ch. Pl. 650.

[5] Cochran v. Goodman, 3 Cal. 244; Stoddard v. Treadwell, 26 Id. 294; see also Dambmann v. White, 48 Id. 450.

[6] Nudd v. Thompson, 34 Cal. 47; and see Newman's Pl. & Pr. 267.

§ 196. **Facts must be Alleged by Direct Averment.** It is the rule, both at common law and under the code, that facts must be alleged by direct averment, and that an averment is a positive statement of a fact, as opposed to argument, or inference,[1] or recital.[2]

For instance, it is not an averment that a certain house in San Francisco, known as the "Willows," is a hotel, if it is stated thus: that "certain furniture was furnished for and used in the furnishing of the hotel in the city and county of San Francisco known as the 'Willows.'"[3] Justice Sanderson, in the case referred to, disposes of the complaint by saying: "It was not an allegation that the goods were used in a hotel, or used in a building called the 'Willows,' or that such building was a hotel; these facts were only stated inferentially." All essential facts must be stated directly in unequivocal language, and not left to be inferred.[4]

One of the reasons why all essential facts should be averred directly and unequivocally is obvious when we consider that if the language of a pleading is doubtful, it is construed most strongly against the pleader.[5]

Especially must the facts be positively alleged to entitle the plaintiff to an injunction founded on the allegations of his complaint.[6] But allegations on information and belief are allowable;[7] but to authorize an injunction, the facts stated on information or belief must be supported by the affidavit of one or more who can testify to such facts from personal knowledge. And to state the nature and source of the information does not vitiate an independent averment of such facts.[8]

§ 197. **Facts must be Alleged in Ordinary and Concise Language.**— As pleading is but a narration of the events which constitute the wrong suffered, and a denial of the same or admission thereof by a different statement, these statements must be made in ordinary and concise language;[9] that is, in just

[1] 1 Ch. Pl. 319; Cowp. 683; Bac. Ab. Pleas, B.

[2] Steph. Pl. 387; Bac. Abr. Pleas, B.; Gould's Pl 55; Co. Lit 303; 1 Ch. Pl. 231; Cowp. 683; Shearer v. Bear River, 4 Cal. 294; Denver v. Burton, 28 Id. 549; Stringer v. Davis, 30 Id. 318; Campbell v. Jones, 38 Id. 507; Gates v. Lane, 44 Id. 392; West v. American Exch Bank, 44 Barb. 175; Truscott v. Dole, 7 How. Pr. 221.

[3] Stringer v. Davis, 30 Cal. 320.

[4] Moore v. Besse, 30 Cal. 572.

[5] Moore v. Besse, 30 Cal. 570; 1 Whitt. 578.

[6] Crocker v. Baker, 3 Abb. Pr. 182; Levy v. Lay, 6 Id. 90; Rateau v. Bernard, 12 How. Pr. 464.

[7] St. Johns v. Beers, 24 How. Pr. 377; Howell v. Fraser, 1 N. Y. Code R. 270.

[8] Burrowe v. Millbank, 5 Abb. Pr. 28.

[9] 1 Van Santv. 35; Rey v. Simpson, 22 How. U. S. 341; Green v. Palmer, 15 Cal. 414; De Witt v. Hays, 2 Id. 468; Jones v. Steamer "Cortez," 17 Id. 487; Smith v. Rowe, 4 Id. 6.

such language as men use in conveying the knowledge of similar facts to one another. The provision of the code in this respect is only declaratory of the common law.[1] Under our statute, there are no words which have one meaning in a pleading filed in an action, and another meaning when used in common conversation. It was stated by Lord Mansfield that "the substantial rules of pleading were founded in strong sense and the soundest and closest logic." In a pleading under our statute this remark is eminently applicable. If the pleader would but tell the story of his client's wrongs upon paper as he would in private conversation, very few of his pleadings would be demurrable. For instance, A. meets B. and says: "C. is indebted to me in the sum of one thousand dollars." B. asks: "What for?" When A. answers: "For goods I sold him in January last; and I have just demanded payment, and he has refused to pay me." Here we have the whole story of A.'s wrongs, and if he should make a complaint spread over many pages, no further facts could be presented, because they do not exist.

§ 198. **Facts must be Alleged with Sufficient Certainty.**—The matter pleaded must be clearly and distinctly stated,[2] so that the pleadings may be understood by the party who is to answer them.[3] The certainty required in pleading relates chiefly to time, place, person, and subject-matter.[4] Facts must be stated with absolute definiteness, and nothing should be left for inference.[5]

All ambiguity must be avoided, as well as language of doubtful, vague, or uncertain meaning.[6] But mere vagueness is not frivolousness, and is to be corrected by amendment.[7] Nor, as before remarked, should such allegations of fact be stated argumentatively.[8] Nor in the alternative.[9] Nor by hypothesis. Such statements are improper, for the court has to deal with the facts in the case, and not with hypothesis.[10] But denials must in many cases be hypothetical.[11]

If time is material to constitute a cause of action, it should

[1] Gladwin v. Stebbins, 2 Cal. 105.
[2] Gould's Pl. 72.
[3] 1 Chit. Pl. 233.
[4] Gould's Pl. 77; Steph. Pl. 279.
[5] Moore v. Besse, 30 Cal. 570; People v. Supervisors of Ulster, 34 N. Y. 268; Ferguson v. Harwood, 7 Cranch, 408.
[6] 1 Ch. Pl. 236; Steph. Pl. 378; Beach v. Bay State Co., 10 Abb. Pr. 71; Christy v. Scott, 14 How. U. S. 282.
[7] Kelly v. Barnett, 16 How. Pr. 135.
[8] Steph. Pl. 178, 383; Austin v. Parker, 13 Pick. 222.
[9] Steph. Pl. 386; Stone v. Graves, 8 Mo. 148; Salters v. Genin, 10 Abb. Pr. 478.
[10] Steph. Pl. 386; Green v. Palmer, 15 Cal. 414; Wies v. Fanning, 9 How. Pr. 543.
[11] Brown v. Ryckman, 12 How. Pr. 313.

be alleged with sufficient certainty.[1] The day on which it is alleged in the pleading under a *videlicet*, that an act is done, is usually, however, immaterial.[2] By "not material" in this connection is meant it may be departed from in the evidence.[3] When it is an essential point, the place at which the contract was made must be alleged.[4] To make a pleading which is bad in these respects definite and certain, the remedy is by motion.[5]

§ 199. **Pleadings, How Construed.**—It will be observed, by what we have before said, that it is not claimed that our code more than points out and defines certain landmarks by which the pleader may be guided. The rules of the common law and the decisions of the courts should still be consulted when a question of the sufficiency of a pleading arises. And all questions pertaining to the common rules of pleading, not expressly directed by statute, remain unchanged. But the code of California, sec. 421, provides: "That all forms of pleadings in civil actions, and the rules by which the sufficiency of pleadings is determined, shall be those prescribed in this code."

In the construction of a pleading for the purpose of determining its effect, the allegations shall be liberally construed, with a view to substantial justice between the parties.[6] And with greater liberality when parties go to trial on an issue of fact than when tested on demurrer.[7] As used in this connec-

[1] People v. Ryder, 2 Kern. (12 N. Y.) 439.

[2] Lester v. Jewett, 1 Kern. 460; Lyon v. Clark, 4 Seld. 148; Dubois v. Beaver, 25 N. Y. 123.

[3] Andrews v. Chadbourne, 19 Barb. 147

[4] See Thatcher v. Morris, 1 Kern. 440; also, Vermilya v. Beatty, 6 Barb. 429; Beach v. Bay State Co., 10 Abb. Pr 71.

[5] People v. Ryder, 2 Kern. 439; Simmons v. Eldridge, 29 How. Pr. 309; Nash. v. Brown, 18 Law Jour. Rep., N. S., 62; Payne v. Banner, 15 Id. 227; Marshall v. Powell, 8 Law Times (2 B.) 159; and 13 Jurist, 126. For remedy by motion, see vol. ii., Notices, Motions, and Orders.

[6] California Code, sec. 452; Nevada Code, sec. 70; Idaho, sec. 70; Arizona, sec. 70; N. Y. Code, sec. 159; 1 Van Santv. 775; 1 Whitt. Pr. 596; Allen v. Patterson, 7 N. Y. 476; Simmons v. Sisson, 26 Id. 264; Blackmer v. Thomas, 28 Id. 67; Yertore v. Wiswell, 16 How. Pr. 8; Marshall v. Shafter, 32 Cal. 176; Butterworth v. O'Brien, 24 How. Pr. 438; Simmons v. Eldredge, 29 Id. 309; Stockwell v. Wager, 30 Id. 271; but see Burke v. Thorne, 44 Barb. 363.

[7] White v. Spencer, 14 N. Y. 247; St. John v. Northrup, 23 Barb. 26; Cady v. Allen, 22 Id. 394; Bennett v. Judson, 21 N. Y. 238. Or on motion: Wall v. Buffalo Wat. Works, 18 Id. 119; Lounsbury v. Purdy, Id. 515; Bank of Havana v. Magee, 20 Id. 355. In Farnsworth v. Holderman, 8 West Coast Rep. 342, the court thus stated this rule: "The contract offered and read in evidence by the plaintiff was meagerly set forth in the complaint; and it is quite clear that under the common-law rules of pleading it could not properly have been admitted in evidence; as under that system, justice between the parties was often secondary to a strictly technical adherence to the doctrine that 'the proofs must correspond with the allegations.' But recent statutes have displaced this system of technicalities, and introduced more equitable rules, requiring the allegations of pleadings to be liberally construed, with a view to substantial

tion, substantial justice means substantial legal justice, to be ascertained and determined by fixed rules and positive statutes.[1] That allegations should be liberally construed does not mean that the omission of substantial averments should be disregarded;[2] since the law will not assume anything in favor of a party, which he has not averred.[3]

Words used in a pleading should ordinarily be construed in their popular sense.[4] Various examples of the meanings which have been given to certain words and phrases in common use in pleadings are given in the note.[5]

justice between the parties. It is sufficient if the complaint contain, in ordinary and concise language and reasonable certainty, allegations of such constitutive facts as will entitle the plaintiff to prove and maintain his case, and give the defendant opportunity to meet and controvert the alleged facts relied upon by the plaintiff. To ignore this express command of the statutes by an adherence to the system which they were intended to abrogate, would be a wanton neglect of a plain rule of law and duty."

[1] Stevens v. Ross, 1 Cal. 95.

[2] Kœnig v. Nott, 2 Hilt. 325; Spear v. Downing, 34 Barb. 523; 12 Abb. Pr. 437.

[3] Cruger v. Hudson River R. R. Co., 2 Kern. 201.

[4] 1 Chit. 238; Backus v. Richardson, 5 Johns. 476; Woodberry v. Sackrider, 2 Abb. Pr. 405; Mann v. Morewood, 5 Sand. 557; Woolnoth v. Meadows, 5 East, 463; Roberts v. Camden, 9 Id. 93; Respublica v. De Longchamps, 1 Dall. 111; Rue v. Mitchell, 2 Id. 59; Brown v. Lamberton, 2 Binney, 37; Pelton v. Ward, 3 Caines, 76. The subject is fully discussed in Walton v. Singleton, 7 Serg. & R. 449.

[5] *Acceptance* implies a due acceptance: Graham v. Machado, 6 Duer, 514: Bk. of Lowville v. Edwards, 11 How. Pr. 216. Allegation that certain drafts were accepted by a corporation, by their treasurer includes an averment of authority in the treasurer to accept: Partridge v. Badger, 25 Barb. 146.

Continuance of Ownership will be presumed where the allegation states ownership on a certain day: Van Rensselaer v. Bonesteel, 24 Barb. 366.

Conversion implies a wrongful conversion: Young v. Cooper, 20 Law Jour. R. Ex. 136; 6 Ex. 62.

Delivery.— Allegations of making a written instrument imply delivery: 1 Chit. Pl. 364; citing Peets v. Bratt, 6 Barb. 652; Prindle v. Caruthers, 15 N. Y. 426; Lafayette Ins. Co. v. Rogers, 30 Barb. 491.

Entry on lands means lawful entry: Turner v. McCarthy, 4 E. D. Smith, 248.

Indorsed means lawfully indorsed: Mechanics' Bank Assn v. Spring Val. Shot Co., 25 Barb. 419; Price v. McClave, 6 Duer, 544; Bank of Geneva v. Gulick, 8 How. Pr. 51. And includes delivery: Bank of Lowville v. Edwards, 11 How. Pr. 216.

Lease in Writing.— A lease said to be in writing must be taken to be a parol lease: Vernam v. Smith, 15 N. Y. 332. And an agreement for quiet enjoyment is implied from its terms: Mayor of New York v. Mabie, 3 Kern. 151; Tone v. Brace, 11 Paige, 566.

Negligence. — Negligence includes gross as well as ordinary negligence: Nolton v. West R. R. Corp., 15 N. Y. 450; Edgerton v. New York and Har. R. R. Co., 35 Barb. 389.

No Award implies no valid award: Dresser v. Stansfield, 14 M. & W. 822; and "no memorial," no valid memorial: Hickes v. Cracknell, 3 Id. 77.

Overpayment means an overpayment in money: Mann v. Morewood, 5 Sandf. 557.

Possession implies legal possession: 23 Ind. 548.

Signed means made, when applied to a promissory note: Price v. McClave, 6 Duer, 544; Bank of Geneva v. Gulick, 8 How. Pr. 51.

Subscription to Stock.—That the defendants subscribed to so many shares of stock implies that they were the owners of and entitled to those shares: Oswego and Syracuse Pl. Rd. Co. v. Rust, 5 How. Pr. 390.

Taking means an unlawful taking: Childs v. Hart, 7 Barb. 372.

Unlawful, Wrongful, are conclu-

§ 200. **The Same—Verified Pleadings.**—A verified pleading must be construed so as to make all its parts harmonize, if possible, with each other.[1] And the entire pleading must be considered together.[2]

The averment which bears most strongly against the pleader will be taken as true.[3] But the liberal provisions of the statute, in facilitating amendments to pleadings, have somewhat modified the maxim that pleadings should be construed most strongly against the pleader, as laid down by standard authors; and which, subject to such modification, has been declared as still the rule of construction.[4]

It is presumed that every person states his case as favorably to himself as possible.[5] And yet the language of a pleading is to have a reasonable intendment and construction.[6]

So, if a pleading has on its face two intendments, it ought to be construed by this rule.[7] But where an expression is capable of different meanings, that meaning should be taken which will support the allegation, and not the one which would defeat it.[8] And when a word has two meanings in law differing in degree merely, it will be understood in its larger sense, unless it appears to be used in its narrower sense.[9]

Doubtful language is construed most strongly against the pleader,[10] unless confessed to be ambiguous, with a request on the part of the pleader to be allowed to amend.[11] Where it is doubtful on which the pleader intends to rely, tort or contract, that construction should prevail which is most unfavorable to the pleader.[12]

sions of law: Payne & Dewey v. Treadwell, 16 Cal. 220. When used in connection with issuable facts, though they do not vitiate a pleading, are surplusage, and had better be omitted: Miles v. McDermott, 31 Cal. 271; Halleck v. Mixer, 16 Id. 575.

Writing Obligatory.— At common law, the term "writing obligatory" in a pleading imports a sealed instrument: Clark v. Phillips, Hempst. 294.

[1] Ryle v. Harrington, 4 Abb. Pr. 421.

[2] Farrish v. Coon, 40 Cal. 33; Allemany v. Petaluma, 38 Id. 553; 4 East, 502; Beach v. Berdell, 2 Duer, 327; Hatch v. Peet, 23 Barb. 575.

[3] Bell v. Brown, 22 Cal. 671; Trisconny v. Orr, 49 Id. 612.

[4] Dickinson v. Maguire, 9 Cal. 46; Moore v. Besse, 30 Id. 570; Kingsley v. Bill, 9 Mass. 198; Doane v. Badger, 12 Id. 69; Star Steamship Co. v. Mitchell, 1 Abb. Pr. (N. S.) 396.

[5] 1 Ch. Pl. 241; Co. Lit. 303; Fuller v. Hampton, 5 Conn. 422.

[6] 1 Ch. Pl. 237; Com. Dig. Pl. (C. 25); Hastings v. Wood, 13 Johns. 482.

[7] United States v. Linn, 1 How. (U. S.) 104; 17 Pet. (U. S.) 88; compare Kerr v. Force, 3 Cranch, 8.

[8] 1 Chit. 237; Vernon v. Keyes, 4 Taunt. 492; Gage v. Acton, 1 Salk. 325; The King v. Stephens, 5 East, 244, 257; 12 Id. 279; Pender v. Dicken, 27 Miss. (5 Cush.) 252.

[9] Miller v. Miller, 33 Cal. 353.

[10] Steph. Pl. 378; 1 Chit. 237; Moore v. Besse, 30 Cal. 570; Bates v. Rosekrans, 23 How. Pr. 98; Ridder v. Whitlock, 12 Id. 208.

[11] Nevada and Sacramento Co. Canal Co. v. Kidd, 28 Cal. 673; Chipman v. Emeric, 5 Id. 49

[12] Ridder v. Whitlock, 12 How. Pr. 212; Munger v. Hess, 28 Barb. 75.

This rule, however, does not require such a construction to be given as will make the pleading absurd.[1] The demand for judgment, and the summons, may in such cases be consulted.[2]

Allegations in the present tense in a verified pleading must be deemed as relating to the date of verification.[3] If the allegations of a defense are pertinent to the controversy, their sufficiency can only be tested on demurrer or on the trial.[4]

A general allegation, followed by a specific one, is governed by the latter. The latter clause of the sentence explains and restricts the former part;[5] and an averment of a legal conclusion at variance with an admitted fact will be disregarded.[6] And such averment, without any fact to warrant it, is always disregarded.

§ 201. **Implied Admissions in Pleadings.**—A failure to answer is an admission of every issuable fact stated in the complaint, and of those only.[7] But such failure to answer does not admit anything contained in the answer of a co-defendant.[8]

§ 202. **Admissions by Demurrer and Answer.**—A demurrer admits the truth of such facts as are issuable and well pleaded, but not the conclusions drawn therefrom. A demurrer to the answer to a petition for a writ of mandate is an admission of the matters averred in the answer.[9] Every material allegation in the complaint, not controverted by the answer thereto, shall, for the purpose of the action, be taken as true.[10] The failure to deny is an admission of the truth of such allegations, and such admission is conclusive.[11] So when the answer contains a cross-complaint, the matters therein alleged will be taken as confessed, if not replied to.[12] But immaterial allegations require no denial, and are not admitted by such failure to deny them.[13] Nor averments of mere evidence.[14] The statement of any new matter in the answer, in avoidance, or constituting

[1] 1 Chit. 237; Marshall v. Shafter, 32 Cal. 176; Lorraine v. Long, 6 Id. 452.

[2] Sellar v. Sage, 12 How. Pr. 531; Rodgers v. Rodgers, 11 Barb. 596; Chambers v. Lewis, 2 Hilt. 591.

[3] Wheeler v. Heermans, 3 Sandf. Ch. 597; Rice v. O'Connor, 10 Abb. Pr. 362.

[4] Carpenter v. Bell, 19 Abb. Pr. 258.

[5] Hatch v. Peet, 23 Barb. 584.

[6] Jones v. Phœnix Bank, 4 Seld. 235; Robinson v. Stewart, 10 N. Y. 189.

[7] Doll v. Good, 38 Cal. 287; De Godey v. De Godey, 39 Id. 157; Bradbury v. Cronise, 46 Id. 287; Coffman v. Brown, 2 West Coast Rep. 98.

[8] Woodworth v. Bellows, 4 How. Pr. 24.

[9] Middleton v. Low, 30 Cal. 596; Branham v. Mayor of San Jose, 24 Id. 602. Whether anything more than the exact allegations of a complaint on demurrer are admitted, see Lyon v. City of Brooklyn, 28 Barb. 612. For further authorities, consult Demurrer, vol. 2.

[10] California Code, sec. 462; Nevada Code, Id.; Idaho, Id.; Arizona, Id.; N. Y. Code, sec. 268.

[11] Doll v. Good, 38 Cal. 287.

[12] Herald v. Smith, 34 Cal. 125.

[13] Canfield v. Tobias, 21 Cal. 349; Oechs v. Cook, 3 Duer, 161.

[14] Racouillat v. Rene, 32 Cal. 450.

a defense or counter-claim, must on the trial be deemed controverted by the opposite party:[1] as a plea of infancy,[2] or the statute of limitations.[3] If a complaint is sworn to, a general denial in the answer thereto admits all the material allegations thereof: the denial should be specific.[4] And where the admissions in the answer negative its general denials, the latter may be disregarded.[5] A specific denial of one or more allegations is an admission of all others well pleaded.[6] So, also, a denial of value alleged is an admission of any value less than the amount alleged.[7] Literal and conjunctive denials are bad. Where allegations are compound, and are denied as a whole in the exact language of the complaint, the allegation will be deemed admitted.[8]

§ 203. **Admissions by Want of Verifications.**—In California, if the answer be not verified, the genuineness and due execution of the written instrument, of which complaint contains a copy, shall be deemed admitted, whether the complaint be verified or not.[9] This is confined to those who are alleged to have signed the instrument. An administrator need not deny the signature of the intestate under oath;[10] and when the defense to an action is founded on a written instrument embodied in the answer, the genuineness and due execution of the instrument shall be deemed admitted, unless an affidavit be filed denying the same.[11] But the due execution of the instrument shall not be deemed admitted, unless the party controverting the same is upon demand permitted to inspect the original.[12] A paper attached to a complaint as an exhibit, purporting to be an admission of agency, is not an admission, if the answer denies the agency.[13] Exhibits attached to an answer need no further verification than what arises from the averments in the answer, that they are copies.[14]

§ 204. **Effect of Admissions.**—No proof is required of facts admitted or not denied,[15] except for an amount of unliqui-

[1] California Code, sec. 462.
[2] Hodges v. Hunt, 22 Barb. 150.
[3] Esseltyn v. Weeks, 2 E. D. Smith, 116; 2 Kern. 635; see, also, Cutler v. Wright, 22 N. Y. 472; McKenzie v. Farrell, 4 Bosw. 193.
[4] Pico v. Columas, 32 Cal. 578; Landers v. Bolton, 26 Id. 393.
[5] Fremont v. Seals, 18 Cal. 433.
[6] De Ro v. Cordes, 4 Cal. 117.
[7] Towdy v. Ellis, 22 Cal. 651.
[8] Blood v. Light, 31 Cal. 115; Woodworth v. Knowlton, 22 Id. 164; Blankman v. Vallejo, 15 Id. 638; Smith v. Richmond, Id. 501; Doll v. Good, 38 Id. 287.
[9] California Code, sec. 447; Sacramento Co. v. Bird, 31 Cal. 73; Burnett v. Stearns, 33 Id. 468.
[10] Heath v. Lent, 1 Id. 411.
[11] California Code, sec. 448.
[12] California Code, sec. 449.
[13] Garfield v. Knight's Ferry and Tab. Mt. Wat. Co., 14 Cal. 37.
[14] Ely v. Frisbie, 17 Cal. 250.
[15] Tuolumne Redemption Co. v. Patterson, 18 Cal. 416; Patterson v. Ely, 19 Id. 28.

dated damages.[1] On such admissions, the *onus* of proving his affirmative allegations will be thrown on the defendant.[2] An admission in the answer that defendant received money to plaintiff's use, and refused to pay the same on demand, does not preclude evidence of payment if payment is set up in the answer.[3] But an admission in one plea does not operate as an admission in respect to an issue presented in another.[4] Where there are several defenses in an answer, an admission made in one is not an admission for all the purposes of the case. It does not destroy the effect of a denial of the matter thus admitted in another answer.[5] When an ultimate fact is admitted, probative facts, tending to establish, modify, or overcome it will not be considered.[6] So an admission of indebtedness implies a promise to pay.[7]

§ 205. **Variance and Defects.**—Although, as heretofore stated, the rule is well established that the *allegata* and *probata* must correspond, and that the plaintiff must prove his case as alleged in his complaint,[8] the codes uniformly provide than an error or defect that does not affect a substantial right shall be disregarded.[9] This provision of the code has been most beneficial in doing away with the technicalities of the common law, and should be liberally construed.[10] And a disregard of a variance may be held equivalent to an amendment at the trial.[11] A variance between the pleadings and proof, if it be not a material variance, that is, one which has actually misled the adverse party to his prejudice, shall not be regarded.[12] But where the allegations in a pleading to which the proof is directed remain unproved in its entire scope and meaning, it is not a case of variance to be disregarded, and an amendment will not be allowed unless it clearly appear to be in furtherance of justice to allow it.[13] If evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for the defense does not object to it at the time, nor move to strike it

[1] Stuart v. Binsse, 10 Bosw. 436.
[2] Thompson v. Lee, 8 Cal. 275.
[3] McDonald v. Davidson, 30 Cal. 174.
[4] Fowler v. Davenport, 21 Tex. 626.
[5] Siter v. Jewett, 33 Cal. 92.
[6] Mulford v. Estudillo, 32 Cal. 131.
[7] Levinson v. Schwartz, 22 Cal. 229.
[8] Gould's Pl. 160; Stout v. Coffin, 28 Cal. 65; Hathaway v. Ryan, 35 Id. 188; Tomlinson v. Monroe, 41 Id. 94.
[9] California Code, sec. 475; New York Code, sec. 176; Nevada, sec. 71; Idaho, sec. 71; Arizona, sec. 71.
[10] Regan v. O'Reilly, 32 Cal. 11.
[11] Mulliken v. Hull, 5 Cal. 245; Coleman v. Playsted, 36 Barb. 26; Smith v. Roe, 1 West Coast Rep. 502.
[12] California Code, sec. 475; Regan v. O'Reilly, 32 Cal. 11; Plate v Vega, 31 Id. 383; Lettmon v. Ritz, 3 Sandf. 734
[13] Egert v. Wicker, 10 How Pr. 193; Catlin v. Hansen, 1 Duer, 309.

out upon the ground of variance, this error is waived.[1] As illustrations as to what constitutes a material or immaterial departure between the pleadings and the proofs, it has been held that the complaint must agree with the summons in the description of the parties.[2] On the contrary it was held in New Hampshire, that the description of the defendants as partners under a particular name or firm in the writ, is not an averment that they promised by that name. Proof of the promise by another name is therefore not a variance.[3] It was held in New York, that a complaint setting forth a conversion by the defendant, of money deposited with him, and demanding the amount of such money, is not a variance from a summons for a money demand on contract.[4] So it has been held by the supreme court of the United States, that a variance between pleadings and findings will not be regarded where there is no allegation that the findings were unwarranted by the proofs.[5] And where, in an action against a common carrier for not complying with a contract to carry or deliver a draft, the complaint alleged that it was signed "John Q. Jackson," the proof showed that it was signed "John Q. Jackson, Agent," it was held, that the variance was immaterial.[6] Further examples of material and immaterial variances are given in the notes.[7]

[1] Boyce v. California Stage Co., 25 Cal. 471; Bell v. Knowles, 45 Id. 193.

[2] Blanchard v. Strait, 8 How. Pr. 83; Tuttle v. Smith, 6 Abb. Pr. 336; Allen v. Allen, 14 How. Pr. 248.

[3] Brown v. Jewett, 18 N. H. 230.

[4] Goff v. Edgerton, 18 Abb. Pr. 381.

[5] Railroad Co. v. Lindsay, 4 Wall. U. S. 650.

[6] Zeigler v. Wells, Fargo & Co., 28 Cal. 263.

[7] *Consideration.*—It is not a variance if, upon the consideration stated in the count, it is proved that the defendant undertook to do an act in addition to that, the non-performance of which is stated in the count: Morrill v. Richey, 18 N. H. 295. A written agreement in this form: "Borrowed and received of A., two hundred and sixty dollars, which I promise to pay on demand, with interest;" imports a consideration on its face; and if the defendant in an action upon it, has introduced evidence tending to show that it was given without consideration, the plaintiff may prove that it was given in payment of a debt of a third person, although there is no averment to that effect in the declaration: Plate v. Vega, 31 Cal. 383; Coc ran v. Daty, 8 Allen (Mass.), 324. A complaint alleged that the consideration of a contract was five thousand five hundred dollars; the proof was, that the consideration was a sight draft, which was paid: Held, no variance: Nash v. Towne, 5 Wall. U. S. 689.

Covenant.—Plaintiffs will not be allowed to recover upon an implied covenant in a lease, totally different from the express covenant declared on, when objection is specifically made, though not taken until the evidence is all in: Merritt v. Clossen, 36 Vt. 172.

Dates.—So, when dates are in question, unless they be the gist of the action, a variance will be immaterial: Zorkowski v. Zorkowski, 3 Robertson, 613; United States v. Le Baron, 4 Wall. U. S. 642. When a contract is alleged to have been made on a certain day, it is no variance to offer in evidence a written contract which took effect on a different day: Id. Time stated in a pleading is often not material, and may be departed from in evidence: Andrews v. Chadbourne,

CHAPTER II.

FORMAL PARTS OF PLEADINGS.

§ 206 The Formal Parts of Pleadings Consist of the caption, commencement, prayer, verification, and subscription. The caption consists of: 1. The name of the state and county in which the action is brought; 2. The name of the court, and,

19 Barb. 147; but compare Walden *v.* Crafts, 2 Abb. Pr. 301; see also People ex rel. Kane v. Ryder, 2 Kern. 433. An averment in the plaintiff's statement, that notice of non-payment was given at a wrong date, is but a defect in form, and the subject of amendment. It is not necessary to aver the precise date when the notice was given. And the averment in the statement not being inconsistent with the fact that another notice was given at the proper time, if the parties go to trial on the merits, on the plea of payment and payment with leave, etc., judgment will not be arrested on the ground of the insufficiency of the statement of notice of non-payment: Loose v. Loose, 36 Pa. St. 538.

Deceit.—A declaration in action of tort, which alleges that the plaintiff, through his agent, procured the defendants to furnish and deliver to him a certain article, and that they negligently and carelessly furnished a different article, and that he sustained an injury by the use of the article furnished, believing it to be that which he ordered, is not sustained by proof that the plaintiff bought the article of a third person, who obtained it of the defendants: Davidson v. Nichols, 8 Allen (Mass.), 75; see Porter v. Hermann, 8 Cal. 619.

Description.—So in a case where the proof, among other things, showed certain lands to extend a certain distance from the north-easterly instead of the north-westerly corner of the tract, as alleged in the complaint. The judgment followed the description in the complaint. Defendant appealed. Held, that the variance in the description of the premises did not prejudice appellant; that the question was one of *identity*, and the fact that the corner of the small tract was called the north-easterly instead of the north-westerly corner, was *itself* insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises: Paul v. Silver, 16 Cal. 75; Calderwood v. Brooks, 28 Id. 151.

Joint Liability.—Although the proof may show a joint liability of the defendant with another, and thus may constitute a variance, yet if the objection is not taken in the mode pointed out by the code, it is one which the defendants shall be deemed to have waived: Lee v. Wilkes, 27 How. Pr. 336. An action against two or more for a joint trespass can not be sustained by evidence of acts committed by one of them: Davis v. Cassell, 50 Maine, 294.

Nuisance.—A declaration charging that the defendant *dug*, opened, and *made*, is sustained by proof that he formed it partially by excavation, and partially by raising walls: Robbins v. Chicago City, 4 Wall. U. S. 657.

Promise.—If the declaration alleges a single promise for the performance of two different things, founded upon an entire consideration, and the evidence shows two promises, at different times, upon distinct considerations, that is a fatal variance: Hart v. Chesley, 18 N. H. 373.

Promissory Note.—It is held in Massachusetts, that a declaration upon an agreement to discharge the plaintiff from all liabilities, on account of certain purchases, as one of a firm recently dissolved, which alleges that a certain note was due from the firm at at the time when the agreement was made, is not sustained by proof that such a note was afterwards given for a liability of the firm; but an amendment would be allowed on terms: Nichols v. Prince, 8 Allen (Mass.), 404; see also Luna v. Mohr, 1 West Coast Rep. 673; Orr v. Hopkins, Id. 157.

Relief.—The complaint should agree

3. The names of the parties, plaintiff and defendant.[1] In the forms throughout this work, the caption will be indicated by the word "Title," which will be understood to include both the venue of the action and the names of the parties.

§ 207. Formal Parts of Complaint—Title of Cause.

Form No. 25.

State of California,
City and County of..... } In the Supreme Court.[2]

ANDREW BLACK, Plaintiff,
against
CHARLES DEAN, Defendant.

§ 208. **The Same.**—The first subdivision of the complaint is an essential part thereof, and constitutes the title of the action. This embraces the name of the state and county or venue of the action, the name of the court in which the action is to be tried, and the names of the parties to the action.[3] An omission to state either of these is an irregularity[4] which may cause the complaint to be set aside or action dismissed on motion.[5]

The California Code provides[6] that the complaint must contain:

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action.

2. A statement of the facts constituting the cause of action, in ordinary and concise language.

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.

with the summons as to the amount claimed: Johnson v. Paul, 14 How. Pr. 454. A departure of the complaint from the summons, in respect to the form of relief, is not ground for reversing the judgment on appeal. If necessary to sustain the judgment, the summons may be amended on appeal from the judgment, so as to conform to the fact proved: Willett v. Stewart, 43 Barb. 98. But, in most states, it seems an appearance waives all errors of service, or form of summons.

Statement of Cause of Action.—The complaint must agree with the summons in the statement of the cause of action: Ridder v. Whitlock, 12 How. Pr. 208; Boington v. Lapham, 14 Id. 360; Shafer v. Humphrey, 15 How. Pr. 564; Campbell v. Wright, 21 Id. 13. But if the complaint set forth a substantial cause of action, and the defect be one that was amendable, it is cured by verdict: Robinson v. English, 34 Pa. St. 324; Garland v. Davis, 4 How. U. S. 131. If the cause of action or defense be substantially proved, the failure to prove certain allegations precisely as laid, is an immaterial variance which will be totally disregarded: Union India Rubber Co. v. Tomlinson, 1 Smith, Com. Pl. R. 364; Lettman v. Ritz, 3 Sandf. 734.

[1] 1 Ch. Pl. 261, 527, 528; 1 Arch. 72, 168; Steph. Pl. 440; Topping v. Fuge, 1 Marsh. 341.

[2] Or, in the superior court, in and for the county of ....., state of .....

[3] See California Code, sec. 426; 4 Comst. 253.

[4] 1 Van Santv. 203.

[5] Williams v. Wilkinson, 1 Code R. 20.

[6] Sec. 426.

§ 209. **Name of County.**—Naming the county in the title of the cause, as above, is a sufficient designation of the county in which the plaintiff desires the trial to be had.[1]

§ 210. **Name of Court.**—Every complaint shall be entitled in the proper court.[2] If a suit be brought in a local court, the full title of the court should be given, *e. g.:* "The City Court of Brooklyn." But where the summons and complaint are served together, its omission from the complaint is a technical irregularity which can not injure the defendant.[3] But if neither the summons nor complaint names any court, no cognizance of the action need be taken.[4]

§ 211. **Names of Parties.**—The law knows only one Christian name, and all intervening initials are no part of the name.[5] It seems that the word "junior" is no part of a name.[6] Nor the word "senior." These are mere unnecessary additions, and should not be inserted in the complaint. Yet we do not see why the terms "junior" or "senior" may not be properly used in a complaint for the purpose of more clearly identifying the person.

The caption should contain the names of all the parties, plaintiff and defendant.[7] The rule is that the names of the parties must be fully set forth and be properly designated, the complaining party as plaintiff, and the adverse party as defendant.[8] If, however, some are named in the title, and all are correctly named in the body of the complaint, it will be sufficient.[9] But being once stated, it is sufficient afterwards to designate them as "the plaintiff" and "the defendant."[10] And this rule applies when plaintiff sues in an official character.[11] And if they sue in

[1] 1 Ch. Pl. 261; Swans. Pl. 141; Williams Pl. 97; Tidd's Pr. 434; Steph. Pl. 230; Tappan v. Powers, 2 Hall, 301; Slate v. Post, 9 Johns. 81; Capp v. Gilman, 2 Black. 45; Davison v. Powell, 13 How. Pr. 237; McKenna v. Fisk, 1 How. U. S. 211; Loehr v. Latham, 15 Cal. 418.

[2] California Code, sec. 426; see codes of Oregon, Nevada, and Arizona; 1 Chit. 263; Tidd's Pr. 43; 1 Van Santv. 202; Kippling v. Watts, Leg. Obs. 86.

[3] See Van Namee v. People, 9 How. Pr. 198; cited in Van Benthuysen v. Stevens, 14 Id. 70.

[4] Ward v. Stringham, 1 Code R. 118. The above authorities have special reference to the New York practice, which in service of summons and commencement of actions differs from the practice of California. It is nevertheless authority upon the general propositions.

[5] People v. Cook, 14 Barb. 261. That the law recognizes but one Christian name was held in the case of Gurwood v. Hastings, Cal. Sup. Ct., July T., 1860.

[6] People v. Cook, 14 Barb. 261.

[7] California Code, sec. 426; N. Y. Code, sec. 142; Oregon Code, sec. 65; Nevada, sec. 39; Arizona, Id.

[8] California Code, sec. 308; N. Y. Code, sec. 70; and see codes of Oregon, Idaho, Nevada, Arizona, etc.

[9] Hill v. Thacter, 2 Code R. 3; 8 How. Pr. 407.

[10] Davison v. Savage, 6 Taunt. 121; Stephenson v. Hunter, Id. 406; Stanley v. Chappell, 8 Cow. 235.

[11] Stanley v. Chappell, 8 Cow. 235; Ketchum v. Morrell, 2 N. Y. Leg.

an official capacity, it is usual and proper that their character should be indicated.[1]

§ 212. **The Same—Mistake in.**—Though the names of the parties must be correctly stated, yet a mistake in the name even of the plaintiff is not fatal, but may be corrected at any time.[2]

§ 213. **Place of Trial.**—The complaint is irregular unless it states the place of trial.[3] And in such case it must be amended or stricken out.[4] It can not be cured by reference to the summons.[5] It may be amended, but only on payment of defendant's costs.[6]

§ 214. **Real Party.**—The complaint shall contain the name of the real party in interest.[7] The term "parties" includes all who are directly interested in the subject-matter of the action, having a right to make defense, control proceedings, examine and cross-examine witnesses, and appeal from the judgment.[8]

§ 215. **Titles to be Avoided.**—In designating the parties to the action, except where suit is brought in an official or representative capacity, no title or other appellation is necessary. If inserted, it will be treated as mere surplusage.[9]

§ 216. **Venue, how Laid.**—As a venue is technically necessary to every traversable fact, when it is once properly laid, all matters following refer to it.[10] It has been held, however, that a venue laid in the body of the complaint is sufficient.[11] The proper mode in all cases will be to lay the venue in the title.

§ 217. **Title of Cause where Some of the Parties are Unknown.**

Form No. 26.

[STATE COUNTY, AND COURT.]

ANDREW BLACK, Plaintiff,
against
CHARLES DEAN, JOHN DOE, and RICHARD ROE, Defendants.

§ 218. **Parties Known and Unknown.**—In certain cases the statute authorizes the plaintiff to proceed against parties

Obs. 58; but compare Christopher v. Stockholm, 5 Wend. 36.

[1] Hill v. Thacter, 2 Code R. 8; 3 How. Pr. 407.

[2] Barnes v. Perine, 9 Barb. 202; Bank of Havana v. Magee, 20 N. Y. 356; Elliot v. Hart, 7 How. Pr. 25, cited in Dole v. Manley, 11 Id. 138; Farnham v. Hildreth, 32 Barb. 277.

[3] 1 Van Santv. 203; Williams v. Wilkinson, 1 Code R., N. S., 20; Hall v. Huntley, Id. 21.

[4] Merrill v. Grinnell, 10 How. Pr. 31; Hotchkiss v. Crocker, 15 Id. 336; Davison v. Powell, 13 Id. 288.

[5] McKenna v. Fisk, 1 How. (U. S.) 241.

[6] Hall v. Huntley, 1 Code R. 21. The authorities apply more particularly to the practice in New York, though they are applicable in California.

[7] Cal. Code, sec. 367; 1 Van. Santv. Eq. Pr. 72; see *ante*, Parties.

[8] Robbins v. Chicago City, 4 Wall. (U. S.) 657. For a further definition, see Giraud v. Stagg, 4 E. D. Smith, 27.

[9] Shelden v. Hoy, 11 How. Pr. 15; Root v. Price, 22 Id. 372; Butterfield v. McOucher, Id. 150.

[10] Cocke v. Kendall, Hempst. 236.

[11] Dwight v. Wing, 2 McLean, 580.

some of whom are known and others unknown, giving the true names of such as are known, and designating the others by fictitious names, stating in the body of the complaint the reason, that "their true names are unknown."

Thus if the plaintiff should be ignorant of the name of the adverse party he may designate him by any name, and amend, of course, at any stage of the proceedings, when his true name shall become known.[1] But the plaintiff can not thus use a fictitious name at his discretion; he is restricted to cases where the name of the adverse party is unknown,[2] and must aver in the pleading that the true name of the party is to the plaintiff unknown.[3]

§ 219. Title of Cause by and against Corporations.

Form No. 27.

[STATE, COUNTY, AND COURT.]

THE MONO GOLD AND SILVER MINING COMPANY, Plaintiff,
against
THE FORT TEJON RAILROAD COMPANY, Defendant.

§ 220. **The Same.**—A corporation can not sue otherwise than by its corporate name,[4] and a company by its firm name or title.[5] In New York a banking association may sue either in its corporate name or in the name of its president.[6] This does not, however, take the place of the averments necessary in the body of the complaint showing their official character.

The word "person" in its legal signification is a generic term, and intended to include artificial as well as natural persons.[7] All distinction between natural and artificial persons, so far as the rules of pleading applicable thereto are concerned, is abolished.[8]

§ 221. The State on the Relation of an Individual.

Form No. 28.

[STATE, COUNTY, AND COURT.]

THE PEOPLE OF THE STATE OF CALIFORNIA, on the relation of John Doe, Plaintiffs,
against
RICHARD ROE, Defendant.

[1] Cal. Code, sec. 474; N. Y. Code, sec. 175; Morgan v. Thrift, 2 Cal 562; see also Rosecrantz v. Rogers, 40 Cal. 491; McKinlay v. Tuttle, 42 Cal. 577; Campbell v. Adams, 50 Cal. 205.

[2] Crandall v. Beach, 7 How. Pr. 271; People v. Herman, 45 Cal. 692.

[3] Waterbury v. Mather, 16 Wend. 611. Where a defendant is sued as James ———, service was returned upon John ———, and judgment was entered against J———: Held to be error, unless there was something in the record to show that the person served was the person sued: Sutter v. Cox, 6 Cal. 415.

[4] Curtiss v. Murray, 28 Cal. 633; Crawford v. Collins, 30 How Pr. 398.

[5] King v. Randlett, 33 Cal. 318.

[6] Leonardsville Bank v. Willard, 25 N. Y. 574.

[7] Douglass v. Pacific M. S. S. Co., 4 Cal. 304.

[8] San Francisco Gas Co. v. The City of San Francisco, 9 Cal. 467; see also sec. 17, Political Code of California.

§ 222. By Guardian ad Litem.

Form No. 29.

[STATE, COUNTY, AND COURT.]

JOHN DOE, by his guardian *ad litem*, Richard Roe, Plaintiff,
against
THE SOUTHERN PACIFIC RAILROAD COMPANY, Defendant.

§ 223. By Assignee for Creditors.

Form No. 30.

[STATE, COUNTY, AND COURT.]

JOHN DOE, as Assignee for the Benefit of the Creditors of James Roe, Plaintiff.
against
RICHARD BLACK.

§ 224. By and against National Banks.

Form No. 31.

[STATE, COUNTY, AND COURT.]

THE FIRST NATIONAL BANK, Plaintiff,
against
THE SECOND NATIONAL BANK, Defendant.

§ 225. **The Same.**—In alleging the corporate existence of a national bank, it is sufficient to state that the plaintiff or defendant is a corporation duly incorporated under the national banking laws of the United States. As affecting the necessity of giving costs, the location of the plaintiff's place of business should sometimes be alleged.[1]

§ 226. By an Officer of the State.

Form No. 32.

[STATE, COUNTY, AND COURT.]

ANDREW BLACK, COMPTROLLER OF THE STATE OF CALIFORNIA, Plaintiff,
against
CHARLES DEAN, Defendant.

§ 227. **Name of Officer.**—The action should be brought in the name of the officer, with the title of his office annexed.[2]

§ 228. Title and Commencement.

Form No. 33.

[STATE, COUNTY, AND COURT.]

ANDREW BLACK, Plaintiff,
against
CHARLES DEAN, Defendant.

The plaintiff complains of the defendant, and alleges:

§ 229. **Commencement.**—The commencement of pleadings consists of those formal words of expression used to introduce the subject-matter.

[1] Abb. N. Cas. 292; Id. 293, note; 4 Id. 224; 50 Barb. 339.
[2] Paige v. Fazackerley, 36 Barb. 392.

§ 230. **Commencement—By One Suing for Himself and Others.**

Form No. 34.

[STATE, COUNTY, AND COURT.]

The plaintiff complains on behalf of himself and of all others (judgment creditors of the defendant), who shall in due time come in and seek relief by and contribute to the expenses of this action, and alleges:

§ 231. **Conclusion of Complaint.**

Form No. 35.

Wherefore the plaintiff demands judgment, etc.

E. F., Attorney for Plaintiffs.

[VERIFICATION.]

§ 232. **Conclusion.**—The conclusion varies according to the character of the document to which it is affixed. In a complaint it consists of the prayer for relief, signature of counsel, and verification; while in an affidavit, the signature and *jurat* only are required. Where two attorneys, partners, subscribe a pleading, they may sign in their firm name.[1] And the subscription to the verification of a pleading is a sufficient subscription of the pleading.[2] The codes provide that every pleading shall be subscribed by the party or his attorney.[3] But an attorney in fact who is not an attorney at law, can not sign his name to the complaint for his principal as "plaintiff's attorney."[4]

§ 233. **Form of Complaint, Complete.**

Form No. 36.

[STATE, COUNTY, AND COURT.]

ANDREW BLACK, Plaintiff,
against
CHARLES DEAN, Defendant.

The plaintiff complains of the defendant, and alleges:

1. For a first cause of action:

I. That, etc.

II. That, etc.

III. That, etc.

2. For a second cause of action:

I. That, etc.

II. That, etc.

III. That, etc.

Wherefore the plaintiff demands judgment, etc.

E. F., Plaintiff's Attorney.

[VERIFICATION.]

[1] Bank of Geneva v. Rice, 12 Wend. 424.
[2] Hubbell v. Livingston, 1 Code R. 63.
[3] California Code, sec. 446; N. Y. Code, sec. 156.
[4] Dixey v. Pollock, 8 Cal. 570.

§ 234. **Clerk's Certificate to Copy of Complaint.**

Form No. 37.

I hereby certify the foregoing to be a full, true, and correct copy of the original complaint on file in my office, in the above-entitled action.

In witness whereof I have hereunto set my hand and affixed the seal of the above-named court, this.....day of.....

A. C., Clerk.

By J. S., Deputy Clerk.

§ 235. **Amended Compiaint — Commencement.**

Form No. 38.

[State, County, Court, and Parties.]

Plaintiff, by leave of the court [or by stipulation] files this his amended complaint and alleges:

[State cause of action as before.]

§ 236. **Formal Parts of Defendant's Pleadings — Commencement of Demurrer.**

Form No. 39.

[Title.]

The defendant demurs to the complaint [or to the first alleged cause of action in the complaint] filed herein and for cause of demurrer alleges:

I. That, etc.

II. That, etc.

§ 237. **Grounds of Demurrer.** — The defendant may state as many grounds or causes of demurrer as may be apparent on the face of the complaint. But each cause or ground should be distinctly alleged, and be numbered in the margin as above, and if the demurrer is sustained, plaintiff may obtain leave of court to file an amended complaint, which will take the place of the original complaint in the action.[1]

§ 238. **Form of Answer.**

Form No. 40.

[Title.]

The defendant, by G. H., his attorney, answers the complaint herein, and

1. For a first defense to the first alleged cause of action, denies:

I. That, etc.

2. For a second defense to said first alleged cause of action, defendant alleges:

I. That, etc.

[1] See this subject discussed at length in second volume under head of "Demurrer."

3. For a third defense to said first alleged cause of action, defendant alleges:

[Set forth facts constituting the defense, and if any of them have been alleged above, an express reference to them will suffice.]

4. And for a counter-claim to the second alleged cause of action, defendant alleges:

I. That, etc.

Wherefore defendant demands, etc. [stating demand on counter-claim].

G. H., Attorney for Defendant.

[VERIFICATION.]

§ 239. **Attorney's Signature,** in New York may be omitted where he has served a notice of appearance; and where two attorneys are partners the firm name will suffice.[1] But the signature of counsel must be attached to an answer in chancery.[2]

§ 240. **Demand of Relief.**—No demand for relief is necessary, unless the defendant seeks some affirmative relief against the plaintiff or against a co-defendant.[3]

§ 241. **Denials of Several Allegations** are but one defense.[4] So several demands against the plaintiff, available as a set-off, may be pleaded in one defense. Each must, however, be distinctly described.[5]

§ 242. **Distinct Defenses.**—Each defense in an answer which is declared to be a distinct defense, must be complete in itself, and must contain all that is necessary to answer the whole cause of action, or that part which it professes to answer, either by express allegation or by an express reference to other parts of the answer;[6] though a partial defense must be pleaded, and may be pleaded as a separate defense.[7]

§ 243. **First Alleged Cause of Action.**—If the complaint contains more than one cause of action, the answer should indicate to which cause of action each defense is interposed.[8] But if the substance of the defense shows to which cause of action it is addressed, it is sufficient on demurrer.[9]

§ 244. **For a First or Second Defense.**—Where a number of defenses are pleaded in one answer, they must be separately stated and plainly enumerated, and the denials should

[1] Bank of Geneva v. Rice, 12 Wend. 424.
[2] Davis v. Davidson, 4 McLean, 136.
[3] Averill v. Taylor, 5 How. Pr. 476.
[4] Otis v. Ross, 8 How. Pr. 193; 11 N. Y. Leg. Obs. 343.
[5] Ranney v. Smith, 6 How. Pr. 420.
[6] Loosey v. Orser, 4 Bosw. 391; Ayres v. Covill, 18 Barb. 260.
[7] Loosey v. Orser, 4 Bosw. 391.
[8] Kneedler v. Sternberg, 10 How. Pr. 67.
[9] Willis v. Taggard, 6 How. Pr. 433.

be distinctly and specifically stated. Consequently there is but one safe rule in stating actions or defenses, and that is to indicate distinctly, by fit and appropriate words, where it commences and where it concludes.[1] But no formal commencement or conclusion is prescribed.[2]

§ 245. **Verification.**—A verified answer is defective if neither the answer nor the verification is subscribed.[3] The subscription of the verification is, however, sufficient.[4] An answer in chancery which does not show the authority of the justice of the peace before whom it was sworn, if not within the state, is not sufficiently certified.[5] If the complaint is verified, the answer must be also verified.[6]

§ 246. **Commencement of Answer by Defendant Sued by a Wrong Name.**

Form No. 41.

[TITLE.]

Defendant, C. D., in the summons and complaint in this action called L. M., answers the complaint herein, and alleges [or denies]:

§ 247. **Commencement of Answer by an Infant.**

Form No. 42.

[TITLE.]

Defendant, an infant under the age of ..... years, by N. O., his guardian, answers the complaint herein, and alleges [or denies]:

§ 248. **Commencement of Answer by an Insane Person.**

Form No. 43.

Defendant, Q. R., an insane person [or a person of unsound mind, or an idiot], by S. T., his guardian, answers the complaint herein, and alleges [or denies]:

§ 249. **Commencement of Answer by Husband and Wife.**

Form No. 44.

[TITLE.]

A. X., one of the above-named defendants, and B. X., his wife, for answer to the complaint in this action, allege [or deny]:[7]

[1] Lippencott v. Goodwin, 8 How. Pr. 242; see Benedict v. Seymour, 6 Id. 298.

[2] Bridge v. Payson, 4 Sandf. 210.

[3] Laimbeer v. Allen, 2 Sandf. 648; 2 Code R. 15.

[4] Hubbell v. Livingston, 1 Sandf. S.

[5] Addison v. Duckett, 1 Cranch C. Ct. 349.

[6] See *post*, pt. 2, c. 3, "Verification of Pleadings."

[7] The above must not be understood as an allegation that the parties are husband and wife.

§ 250. Commencement of Separate Answer of Defendant.

Form No. 45.

[TITLE.]

The defendant, A. B., answers on his own behalf the complaint herein, and alleges [or denies]:

§ 251. Forms of Petitions—Petition to the Court.

Form No. 46.

[TITLE.]

To the honorable the superior court of the county of ....., state of California [or other court with full designation].

The petition of ....., of the city of ....., shows:

§ 252. Petition to a Judge.

Form No. 47.

[TITLE.]

To the honorable ....., judge of the superior court of the county of ....., state of California [or other magistrate, giving full official designation].

The petition of, etc.

§ 253. Caption of Papers Used in Probate Proceedings—Decedent's Estate.

Form No. 48.

[STATE, COURT, AND COUNTY.]

IN THE MATTER OF THE ESTATE OF JOHN DOE, Deceased.

The petition of, etc.

§ 254. The Same—Minor's Estate.

Form No. 49.

[STATE, COURT, AND COUNTY.]

IN THE MATTER OF THE ESTATE OF JOHN DOE, a Minor.

The petition of, etc.

§ 255. The Same—Insane Person's Estate.

Form No. 50.

[STATE, COURT, AND COUNTY.]

IN THE MATTER OF THE ESTATE OF JOHN DOE, An Insane Person.

§ 256. Caption of Papers used in Insolvency Proceedings.

Form No. 51.

[STATE, COUNTY, AND COURT.]

IN THE MATTER OF THE ESTATE OF JOHN DOE, an Insolvent Debtor,

§ 257. Caption of Papers on Habeas Corpus.

Form No. 52.

[STATE, COUNTY, AND COURT.]

IN THE MATTER OF JOHN DOE, on *Habeas Corpus*.

§ 258. **Caption of Papers on Disbarment of Attorney.**

Form No. 53.

[STATE, COUNTY, AND COURT.]

In the Matter of the Application for the Disbarment of JOHN DOE, a a member of the bar of this court, and for the certificate issued to him by this court.

§ 259. **Caption of Papers used in Other Courts.**

Form No. 54.

JOHN DOE, Plaintiff,
against
RICHARD ROE, Defendant. } County Court, ... County.

§ 260. **Caption of Papers used in Justices' Courts.**

Form No. 55.

In the justice's court of the township of ....., county of ....., state of California.

JOHN DOE, Plaintiff,
against
RICHARD ROE, Defendant.

§ 261. **Order of a Court in an Action.**

Form No. 56.

At a regular term of the superior court of the city and county of ....., state of California, held at the city hall in the city and county of San Francisco, etc.

Present: The Honorable ....., Judge.

§ 262. **Caption, Commencement, and Conclusion of Affidavits.**

Form No. 57.

[STATE, COUNTY, AND COURT.]

JOHN DOE, Plaintiff,
against
RICHARD ROE, Defendant. } Affidavit for .....

State of California,
County of ..... } ss.

John Doe, of ..... [and if there are two deponents, and James Doe, of ....., severally], being duly sworn, say [each for himself]:

1. I am the plaintiff [or other description of the deponent].

2. I have, etc. [State facts sworn to].

[Signature].....

Subscribed and sworn to before me this ..... day of ....., 18.....

E. F.,
[SEAL] Notary Public.

§ 263. **Affidavits — Before Whom can be Taken.**—Affidavits to be used before any court, judge or officer of the state

(California), may be taken before any judge or clerk of any court, justice of the peace, or notary public in the state.[1] And an affidavit in which the official character of the justice before whom it is taken, does not appear, is good,[2] as courts take judicial notice of the official character of justices of the peace in their own states. An affidavit taken in another state of the United States, to be used in this state, may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, or before any notary public in another state, or before any judge or clerk of a court of record having a seal.[3] An affidavit taken in a foreign country, to be used in this state, may be taken before an embassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country.[4] When an affidavit is taken before a judge or a court in another state, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court under the seal thereof.[5]

§ 264. **The Same—Date.**—The jurat should state the day on which it was sworn.[6] Unless it is shown, when the objection is raised, that it was sworn in due season for its purpose. So held where it was shown by the opposing affidavit that the oath was taken before the judgment was entered.[7]

§ 265. **The Same—Entitling Affidavit.**—Of course, when there is no proceeding pending, the affidavit must not be entitled. Though it has been held that a superfluous title may be disregarded as not affecting the substantial rights of the party.[8]

§ 266. **The Same—Information and Belief.**—It is entirely useless in the affidavit to a pleading to insert the words, "except as to those matters stated on information and belief, and as to those matters he believes it to be true," unless the pleading contains some averment on information and belief.[9]

§ 267. **The Same—Jurat.**—The jurat should be in a special form where deponent is illiterate,[10] or blind.[11] Otherwise the

[1] California Code Civil Proc., sec. 2012.
[2] Ede v. Johnson, 15 Cal. 58.
[3] Code C. P., sec. 2013.
[4] Code C. P., sec. 2014.
[5] Code C. P., sec. 2015.
[6] Doe v Roe, 1 Chit. 228; 18 Eng. Com. L. 133.
[7] Schoolcraft v. Thompson, 7 How. Pr. 446.
[8] Pindar v. Black, 4 How. Pr. 95.
[9] But see Truscott v. Dole, 7 How. Pr. 221; Patterson v. Ely, 18 Cal. 28; Kelly v. Kelly, 1 West Coast Rep. 143.
[10] Tidd's Pr. 495; 3 Moult. Ch. Pr. 551.
[11] Matter of Christie, 5 Paige, 242; see also Matter of Cross, 2 Ch. Sent. 8.

common form is sufficient.[1] It, however, seems to be sufficient if a party hears the paper read, and swears he knows its contents.

§ 268. **The Same—Names of Deponents.**—The names of all the deponents should be mentioned.[2]

§ 296. **The Same—Place.**—The jurat need not specify the place where it was sworn, as the venue sufficiently shows it.[3]

§ 270. **The Same—Severally Sworn.**—The affidavit should show that they were severally sworn.[4]

§ 271. **The Same—State and County.**—It has been held that the omission of the venue from an affidavit is fatal. The venue is an essential part of every affidavit, and *prima facie* evidence of the place where it was taken.[5] This certainly can not be laid down as the rule with all classes of affidavits. If by the venue it appears that the affidavit was taken at a place beyond that where the officer was authorized to act, it will not be received by the court.[6] But it is no objection that it does not appear that the affidavit was sworn to within the limits of the city for which the commissioner was appointed. The court will not presume the contrary.[7] An affidavit, notice, or other paper without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.[8]

§ 272. **The Same—Subscription.**—The affidavit should be subscribed by deponent or deponents.[9]

§ 273. **The Same—Subscription to Jurat.**—The jurat must be subscribed by the officer, with his official addition.[10] An affidavit should show upon its face that it was made before some officer competent to take affidavits.[11]

[1] Fryatt v. Lindo, 3 Edw. Ch. 239.

[2] Anonymous, 2 Chit. 19; 18 Eng. Com. L. 235.

[3] 1 Tidd's Pr. 496; Mosher v. Heydrick, 45 Barb. 549; 1 Abb. Pr., N. S., 258; 30 How. Pr. 161; Belden v. Devoe, 12 Wend. 223; Mfrs. and Mech. Bank v. Cowden, 3 Hill, 461.

[4] Pardoe v. Territt, 5 M. & G. 291; 44 Eng. Com. L. 159; Kincaid v. Kipp, 1 Duer, 692; 11 N. Y. Leg. Obs. 313.

[5] Lane v. Morse, 6 How. Pr. 394; Cook v. Stuats, 18 Barb. 407. Compare Parker v. Baker, 8 Paige, 428; Barnard v. Darling, 1 Barb. Ch. 218.

[6] Davis v. Rich, 2 How. Pr. 86; Sandland v. Adams, Id. 127; Snyder v. Omstead, Id. 181.

[7] Parker v. Baker, 8 Paige, 428.

[8] Cal. Code C. P., sec. 1046.

[9] 1 Newl. Ch. Pr. 165; Hathway v. Scott, 11 Paige, 173; overruling in effect, Huff v. Spicer, 3 Cai. 190; Col. & C. Cas. 495; and Jackson v. Virgil, 3 Johns. 540, which held that if an affidavit begins with the names of the deponent, and appears to have been duly sworn to before a proper magistrate, it is sufficient without the signature of deponent; see also Ede v. Johnson, 15 Cal. 57.

[10] Ladow v. Groom, 1 Den. 429; Jackson v. Stiles, 1 Cow. 575. Compare, as to addition, Hunter v. Le Conte, 6 Cow. 728

[11] Lane v. Morse, 6 How. Pr. 395

§ 274. **The Same—That I am, etc.**—The description or residence of deponent should be directly alleged as above.[1]

§ 275. **Certificate of Clerk to Affidavit.**

Form No. 58.

State of..... }
County of ..... } ss.

I, S. T., clerk of the county court of said county of....., do hereby certify that O. P., before whom the above affidavit was taken, is a judge of the county court [or other title], which is a court of record of said state [or county, as the case may be], having a seal, existing pursuant to the laws thereof, in and for said county [or country, district, or otherwise], and that he is duly qualified and commissioned as such, and that the subscription to the same is his genuine signature.

Witness my hand and the seal of said court, at....., this ..... day of ....., 18...

[SEAL.] S. T., County Clerk.

§ 276. **Jurat, Where Deponent is Blind or Illiterate.**

Form No. 59.

Sworn before me, this ..... day of ....., 18...., the same having been in my presence [or by me] read to the deponent, he being blind [or illiterate], and he appearing to me to understand the same.

R. S.,
Notary Public.

§ 277. **Jurat, where Deponent is a Foreigner.**

Form No. 60.

Sworn before me, this ..... day of ....., 18..., I having first sworn R. M., an interpreter, to interpret truly the same to the deponent, who is a foreigner not understanding the language, and he having so interpreted the same to deponent.

A. C.,
County Clerk.

[1] Steinbach v. Leese, 27 Cal. 293; Ex parte Bank of Monroe, 7 Hill, 177; Cunningham v. Goelet, 4 Den. 71; Staples v. Fairchild, 3 N.Y. (3 Comst.) 41; Payne v. Young, 8 Id. (4 Seld.) 153. Compare People v. Ransom, 2 Id. (2 Comst.) 490.

CHAPTER III.

VERIFICATION OF PLEADINGS.

§ 278. **Provisions of Code in Regard to Verification.**—The codes of all states which have adopted the reformed system of procedure contain provisions in regard to verification of pleadings. In California the code provides that every pleading must be subscribed by the party or his attorney; and where the complaint is verified, or when the state, or any officer of the state, in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or unless an officer of the state, in his official capacity, is defendant. In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause are unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reason why it is not made by one of the parties. When a corporation is a party, the verification may be made by any officer thereof.

§ 279. **Construction of Statute.**—The object of the verification is to secure good faith in the averments of the party.[2] There is nothing in the statute absolutely requiring the complaint to be verified, with the exception of complaints in actions for an injunction.[3] Or in actions brought against steamers, boats, and vessels.[4] So also in proceedings against attorneys.[5] And in applications for the voluntary dissolution of corporations.[6] And such other actions as are specially provided for. The safer and better practice, however, is to verify the complaint in all cases, and if the complaint is verified, the answer, as above stated, shall be verified also, except when an admission of the truth of the complaint might subject the party to prosecution

[1] Cal. Code C. P., sec. 446.
[2] Patterson v Ely, 19 Cal. 28.
[3] Cal. Code C. P., sec. 527.
[4] Cal. Code C. P., sec. 815.
[5] Sec. 291.
[6] Sec. 1229.

for felony or misdemeanor.[1] Unless such prosecution is barred by the statute of limitations.[2] And when the court could not see from the pleadings themselves that the admission of the allegations in the complaint would subject the defendant to a criminal prosecution, he may show that fact by affidavit.[3] So also whenever the defendant would be excused from testifying as a witness to the truth of any matter denied by the answer, he need not verify the answer.[4] But defendant is not excused from verifying his answer when the complaint charges him with fraud in making the assignment.[5] Such verification should be by the affidavit of the party, and if he be absent from the county, then by his attorney, or other person having a knowledge of the facts.[6] A verification is sufficient if it conform substantially to the statute.[7]

§ 280. **Defective Verification.**—A defect in verification of a complaint, even when apparent upon its face, does not render the complaint irregular, because a verification is no part of a pleading.[8] It only operates to relieve the defendant from the obligation to verify his answer. This, however, can not be in cases where the complaint is required to be sworn to. If such defect be latent, the remedy is by motion,[9] and not by demurrer.[10]

The objection to the want of verification of a complaint, where verification is required by statute, must be taken either before answer or with the answer. The filing of the answer waives the defect.[11] So, also, the objections to the verification to the complaint, that it was not authenticated by the seal of the notary; that there was no venue to the affidavit; that there was no evidence that the officer was a notary public, etc., being

[1] Wheeler v. Dixon, 14 How. Pr. 151; Anable v. Anable, 24 Id. 92.

[2] Henry v. Salina Bk., 1 Comst. 86.

[3] Scoville v. New, 12 How. Pr. 319; Lynch v. Todd, 13 Id. 547; Wheeler v. Dixon, 14 Id. 151; Anable v. Anable, 24 Id. 92; Moloney v. Dows, 2 Hilt. 247; Blaisdell v. Raymond, 5 Abb. Pr. 144.

[4] Drum v. Whiting, 9 Cal. 422; Blaisdell v. Raymond, 5 Abb. Pr. 144; Re Tappan, 9 How. Pr. 394; Moloney v. Dows, 2 Hilt. 247; People v. Kelly, 24 How. Pr. 369; Clapper v. Fitzpatrick, 1 Code R. 69.

[5] Wolcott v. Winston, 8 Abb. Pr. 422.

[6] See Cal. Pr. Act, sec. 55; N. Y. Code, sec. 157; Oregon, sec. 79; Nevada, sec. 55; Idaho, Id.; Arizona, Id.; consult also Humphreys v. McCall, 9 Cal. 59; Ely v. Frisbie, 17 Id. 250; Patterson v. Ely, 19 Id. 28.

[7] 2 Sandf. 647; Ely v. Frisbie, 17 Cal. 250.

[8] George v. McAvoy, 6 How. Pr. 200.

[9] Gilmore v. Hempstead, 4 How. Pr. 153.

[10] Seattle Coal Co. v. Thomas, 57 Cal. 197; Fritz v. Barnes, 6 Neb. 435; Warner v. Warner, 11 Kans. 121; Pudney v. Burkhardt, 62 Ind. 179.

[11] Greenfield v. Steamer Gunnell, 6 Cal. 69; Laimbeer v. Allen, 2 Code R. 15; see California Code Civil Proc., sec. 434;

technical, should be taken in the court below and can not be raised for the first time in the supreme court.[1]

§ 281. **Before Whom may be Taken.**—The attorney of the plaintiff, being a notary, may take the affidavit verifying the complaint.[2]

§ 282. **Subscription to Verification.**—The verification must be subscribed by the party making it.[3] And such subscription, it has been held, was a sufficient subscription of a pleading.[4] A verified answer is defective if neither the answer nor the verification is subscribed.[5]

§ 283. **When Answer may be Verified—Amendment.** A defendant may be allowed to verify his answer before or at the trial.[6] If defendant omit to verify the answer to a verified complaint, the plaintiff may proceed as if no answer was filed.[7] Inability of counsel to obtain defendant's verification in time can not avail in resisting a motion to strike out.[8] If the verification be omitted or defective, the court may allow the same to be inserted or amended.[9]

§ 284. **Verification by Sole Plaintiff or Sole Defendant.**

Form No. 61.

State of California. }
City and County of..... } ss.

A. B., the plaintiff [or defendant] above named, being duly sworn, says as follows:

I have read the foregoing complaint [or answer] and know the contents thereof, and that the same is true to the best of my knowledge.

[SIGNATURE.]

Subscribed and sworn to before me, this.....day of ....., 18...

J. K., County Clerk.

[1] Kuhland v. Sedgwick, 17 Cal. 123.

[2] Kuhland v. Sedgwick, 17 Cal. 123; Young v. Young, 18 Minn. 90; *contra*, Meade v. Thorne, 2 West. L. M. 312; Warner v. Warner, 11 Kans. 121; Peyser v. McCormack, 51 How. Pr. 205.

[3] Laimbeer v. Allen, 2 Sandf. 648.

[4] Hubbell v. Livingston, 1 Code R. 63.

[5] Laimbeer v. Allen, 2 Sandf. 648; S. C., 2 Code R. 15.

[6] Angier v. Masterson, 6 Cal. 61; Arrington v. Tupper, 10 Id. 464; Lattimer v. Ryan, 20 Id. 628.

[7] Stout v. Curran, 7 How. Pr. 36; Moloney v. Dows, 2 Hilt 247; Hull v. Ball, 14 How. Pr. 305; McCullough v. Clark, 41 Cal. 298; Littlejohn v. Munn, 3 Paige Ch. 280.

[8] Drum v. Whiting, 9 Cal. 422.

[9] Bovles v. Hogt, 2 West. L. M. 548; White v. Freese, 2 C. S. C. R. 30; Bragg v. Bickford, 4 How. Pr. 21; Jones v. U. S. Slate Co., 16 Id. 129; Davis v. Potter, 4 How. 155. As to the effect of a verification when a written instrument is embodied in a complaint, consult California Code Civil Proc., sec. 447; Corcoran v. Doll, 32 Cal. 83; see also Heath v. Lent, 1 Id. 411. When embodied in an answer, see California Code Civil Proc., secs. 448, 449.

§ 285. On Information and Belief.

Form No. 62.

[VENUE.]

A. B., the plaintiff above named, being duly sworn, says as follows:

I have read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge, except as to those matters therein stated on information or [and] belief, and as to those matters I believe it to be true.

[SIGNATURE]

Subscribed and sworn to before me, this .... day of ....., 18....

J. K., Notary Public.

§ 286. **The Same.**—There seems to be no reason why our statute prescribes that the verification shall be "upon information or belief," instead of "upon information and belief," yet the former is the statute of this state; in New York the statute is different; there the word "and" is used. There can be no reason why the language of the verification should not follow the language of the pleading verified. In such case the verification should use the word "or" or "and" to correspond with the pleading. The word "belief" is to be taken in its ordinary sense, and means the actual conclusion of the party drawn from information. Positive knowledge and mere belief can not exist together.[1] If the pleader avers matters "upon information and belief," or "upon information or belief," the verification will be sufficient if his affidavit states that as to the matters thus alleged he believes the pleading to be true.[2] Where the pleader states nothing on the information or belief, the verification need not mention the same.[3] If, however, there are such allegations in the pleading, an allegation that "the same are true according to the best of his knowledge and belief," is insufficient.[4] So, also, a verification alleging that "the same is substantially true," etc., was held insufficient, as containing a qualification that was a material departure from the requirements of the code.[5]

[1] Humphreys v. McCall, 9 Cal. 59.

[2] Patterson v. Ely, 19 Cal. 28; Kirk v. Rhoads, 46 Id. 403.

[3] Patterson v. Ely, 19 Cal. 28; Kinkaid v. Kipp, 1 Duer, 692; Ross v. Longmair, 15 Abb. Pr. 326; Kelly v. Kelly, 1 West Coast Rep. 143.

[4] Van Horne v. Montgomery, 5 How. Pr. 238; Stadler v. Parmlee, 10 Iowa, 23. A verification omitting the words "of his own knowledge," was held sufficient in Southworth v. Curtis, 6 How. Pr. 271; see also Arata v. Tellurium etc. Co., 3 West Coast Rep. 151; but adjudged fatal in Williams v. Riel, 11 How. Pr. 375; Tiobalds v. Selfridge, 12 Id. 64.

[5] Waggoner v. Brown, 8 How. Pr. 212.

§ 287. By One of Several Plaintiffs or Defendants.

Form No. 63.

[VENUE]

A. B., being duly sworn on his own behalf, and on behalf of R. S., one of the other defendants therein, says as follows.

1. I am one of the defendants in the above-entitled action.

2. I have read the foregoing answer, and know the contents thereof, and that the same is true of my own knowledge, except as to the matters which are therein stated on information or [and] belief, and as to those matters I believe it to be true.

[JURAT.] [SIGNATURE.]

§ 288. **When One of Several may Verify.** — One of several plaintiffs may verify.[1] But in certain cases it has been held that where the action is joint, the parties should unite in the verification.[2] Thus in an action against husband and wife, where her interest is separate, the answer must be verified by both, if relied on as the answer of both.[3]

§ 289. By Two Parties, Severally.

Form No. 64.

[VENUE.]

A. B. and C. D., the plaintiffs [or defendants] above named, being duly sworn, say, each for himself, as follows:

I have read the foregoing complaint [or answer], and know the contents thereof, and the same is true of my own knowledge [except as to those matters stated therein on information and belief, and as to those matters I believe it to be true].

[JURAT.] [SIGNATURES.]

§ 290. By Officer of Corporation.

Form No. 65.

[VENUE.]

A. B., being duly sworn, says as follows:

1. I am an officer of the ..... company, the plaintiffs [or defendants] above named, to wit, the president thereof.

2. I have read the foregoing complaint [or answer], and know the contents thereof, and the same is true of my own knowledge [except as to those matters which are therein stated on information or [and] belief, and as to those matters I believe it to be true].

[JURAT.] [SIGNATURE.]

§ 291. **Grounds of Belief—Sources of Knowledge.**—It has been held that a verification made by an officer of a corpo-

[1] Patterson v. Ely, 19 Cal. 28; Kelley v. Bowman, Transcript, July 18, 1861.

[2] Andrews v. Storms, 5 Sandf. 609; Alfred v. Watkins, 1 Code R., N. S., 348; Hull v. Ball, 14 How. Pr. 305.

[3] Youngs v. Seely, 12 How. Pr. 395; Reed v. Butler, 2 Hilt. 589.

ration need not state the grounds of belief or sources of knowledge. It is a verification of the corporation.[1]

§ 292. **Managing Agent.**—A managing agent of a corporation is an officer of the corporation within the provisions of the act.[2]

§ 293. **By Attorney or Agent, when the Facts are within his Personal Knowledge.**

Form No. 66.

[VENUE.]

A. B. being first duly sworn, says:

1. I am the attorney of the plaintiff in this action [or agent as the case may be].

2. I have read [or heard read] the foregoing complaint [or answer], and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein averred to be upon information or belief, and as to these matters I believe it to be true.

3. The reason why the verification is not made by the plaintiff [or defendant], is that the facts stated in said complaint [or answer] are not within his personal knowledge.

[JURAT.] [SIGNATURE.]

§ 294. **The Same.**—The attorney may verify a complaint in two cases:

1. When the parties are absent from the county where the attorney resides, or from some cause are unable to verify it.

2. When all the material allegations of the petition are within his personal knowledge.[3] But in all cases of verification by attorney or agent, the reason why the verification is not made by the party must be set forth in the affidavit.[4]

Such verification by an agent must disclose the nature of the agency.[5] But it is not necessary to verify by the agent who knows most about the matter.[6]

[1] Glaubensklee v. Hamburg and American Packet Co., 9 Abb. Pr. 104; compare Van Horne v. Montgomery, 5 How. Pr. 238; Anable v. Anable, 24 Id 92.

[2] Glaubensklee v. Hamburg and American Packet Co., 9 Abb. Pr. 104.

[3] Mason v. Brown, 6 How. Pr. 481; Treadwell v. Fassett, 10 Id. 184; Wheeler v. Chesley, 14 Abb. Pr. 441.

[4] Cal. Code C. P., sec. 446. For examples of sufficient verifications by attorneys, see Wheeler v. Chesley, 14 Abb. Pr. 441; Stannard v. Mattice, 7 How. Pr. 4; Myers v. Gerritts, 13 Abb. Pr. 105; Gourney v. Wersuland, 3 Duer, 613; Ross v. Longmuir, 24 How. Pr. 49. For examples of insufficient verifications by attorneys or agents, see Fitch v. Bigelow, 5 How. Pr. 237; Meads v. Gleason, 13 Id. 313; Tibballs v. Selfridge, 12 Id. 64; Soutter v. Mather, 14 Abb. Pr. 440; Bank of the State of Maine v. Buel, 14 How. Pr. 311.

[5] Boston Locomotive Works v. Wright, 15 How. Pr. 253.

[6] Drevert v. Appsert, 2 Abb. Pr. 165

§ 295. **Agent Having Notes in Possession.**—Stating that the notes were in possession of deponent sufficiently avers that deponent was agent of the plaintiff.[1] And authorized to verify the complaint.[2] Whether plaintiff was within the county or not.[3] But in California, possession of the written instrument or obligation upon which the suit is based does not authorize the attorney or agent to verify the complaint.

§ 296. **By Agent when the Party is Absent from the County.**

Form No. 67.

[VENUE.]

A. B., being duly sworn, says as follows:

1. I am the attorney [or one of the attorneys] of the plaintiff [or defendant] in this action.

2. I have read the foregoing complaint [or answer] and know the contents thereof, and that it is true of my own knowledge [except as to those matters therein stated on information or [an] belief, and as to those matters I believe it to be true].

3 The reason this verification is not made by the plaintiff [or defendant] is that he is not within the county of which is the county where I reside.

[JURAT.] [SIGNATURE.]

§ 297. **The Same—Absent from County.**—When the party is not within the county where the attorney resides, a verification made by the attorney is good, though he have no personal knowledge of the truth of the allegations.[4] Although it appears that the client has a resident agent through whom the attorney has obtained his information.[5]

§ 298. **The Same—Grounds of Belief.**—Where an attorney or agent verifies a complaint, the verification shall state the grounds of belief, and the reasons why it was not made by the party.[6] The grounds of knowledge or belief need not be set forth if all the allegations in the pleading are made in the positive form.[7] Under the California Code it is not necessary that the attorney or agent should state his grounds of belief.

[1] Myers v. Gerrits, 13 Abb. Pr. 106.
[2] Myers v. Gerrits, Id.
[3] Wheeler v. Chesley, 14 Abb. Pr. 441.
[4] Humphreys v. McCall, 9 Cal. 59; Ely v. Frisbie, 17 Id. 250; Patterson v. Ely, 19 Id. 28; Lefevre v. Latson, 5 Sandf. 650. Roscoe v. Maison, 7 How. Pr. 121; Stannard v. Mattice, Id. 4; Smith v. Rosenthall, 11 Id. 442; Wilkin v. Gilman, 13 Id. 225; People v. Allen, 14 Id. 334; Drevert v. Appsert, 2 Abb. Pr. 165; Myers v. Gerritts, 13 Id. 106; Gourney v. Wersuland, 3 Duer, 613; Dixwell v. Woodsworth, 2 Code R. 1.
[5] Drevert v. Appsert, 2 Abb. Pr. 165.
[6] Oregon Code, sec. 79; Boston Locom. Works v. Wright, 15 How. Pr. 253; Meads v Gleason, 13 Id. 309; People v. Allen, 14 Id. 334.
[7] Ross v. Longmuir, 15 Abb. Pr. 326.

§ 299. **The Same—Guardian.**—The guardian, or attorney for the guardian, of an infant plaintiff may verify.[1] In an action by an infant appearing by a guardian *ad litem*, the complaint may properly be verified by the guardian, and he need not do so as the agent or attorney for the infant, but may as the plaintiff.[2]

§ 300. **Where the Absent Plaintiff is a Corporation.**

Form No. 68.

[VENUE.]

A. B., being first duly sworn, says: I am the attorney of the plaintiff in this action. I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge [except, etc.]

The reason why the complaint in this cause is not verified by an officer of said corporation is, that its place of business is at ..... in the state of ....., and that none of its officers are now within the county of ...., where I reside.

[JURAT.] [SIGNATURE.]

§ 301. **Verification of Petition.**

Form No. 69.

[Insert venue, introduction, and description of deponent, and add]:

I have read the foregoing petition subscribed by me, and know the contents thereof; that the same is [or, where such papers are annexed, and that the same and the accounts and inventories hereunto annexed are] true of my own knowledge [except as to the matters therein stated on information or [and] belief, and as to those matters I believe it to be true].

[JURAT.] [SIGNATURE.]

§ 302. **Verified Petition.**—The petition for the perpetuation of testimony must be verified by the applicant thereof.[3]

[1] Hill v. Thacter, 2 Code R. 8; Anable v. Anable, 24 How. Pr. 92; Rogers v. Cruger, 7 Johns. 557.

[2] Anable v. Anable, 24 How. Pr. 92.

[3] Code C. P., sec. 2084.

PART THIRD.

PLEADINGS OF PLAINTIFF.

CHAPTER I.

COMPLAINTS IN GENERAL.

§ 303. **In General.** — The complaint, under the California code, or the petition, as it is called in some states, is the first pleading in the action, and the foundation for all future proceedings. In modern practice, it is a substitute for the declaration at common law, and under the new system, the plaintiff's allegations showing his cause of action, whether at law or in equity, are termed the complaint. The code as adopted in most of the states and territories of the Union declares expressly what the complaint shall contain, which is as follows: 1. The title of the action, specifying the name of the court and the name of the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant; 2. A statement of the facts constituting the cause of action in ordinary and concise language; and 3. A demand for the relief which the plaintiff claims.

§ 304. **First Subdivision of Complaint.**—The first subdivision of complaints under the code, which provides what the complaint shall contain, will be found under the title Formal Parts of Pleadings, part second, chapter II, where the entitling of a cause may be found, with forms and authorities in support thereof.

§ 305. **Averment of Character and Capacity.**—If the plaintiff sue in a representative or official character or capacity,

the character must be alleged as well as stated in the title.[1] It is usual and proper in stating the title to a complaint in such cases to add to the name of the party a designation stating the especial character which he sustains, as "A. B., Executor," "C. D, Sheriff." This, however, will not dispense with the necessity of the averment of the character in which he sues. Standing alone in the title would be but a mere *descriptio personæ*.[2] Such an averment, and also an averment that the action is brought by him in such capacity, is sufficient to sustain a recovery in that capacity.[3] In general a plaintiff can not sue in two capacities, private and representative, in the same action.[4]

§ 306. **The Same — Action by Agent.**—The character of agent of a company must be averred.[5] But an agent can not sue as such unless specially authorized by statute.

§ 307. **The Same Action by Assignee.** — The character of assignee must be averred when plaintiff sues in that capacity.[6] But the form of the assignment, or the consideration thereof, need not be stated.[7] And on an assignment by a corporation, the plaintiff need not aver that the directors were authorized to make it.[8]

§ 308. **The Same—Action by Company or Partnership.** In an action where a member of a company is plaintiff or defendant, membership must be averred.[9] And the jurisdiction and a cause of action must be shown.[10] And in the state of New York, where such actions will lie, in actions by or against joint stock companies, the complaint must allege that the company is a joint stock company or association, consisting of more than seven shareholders or associates.[11] But in an action in which the defendants were named Hull & Co., the "& Co." were considered surplusage.[12] A complaint which contains no other

[1] Gould v. Glass, 18 Barb. 185; Smith v. Levinus, 8 N. Y. 472, and other authorities there cited.

[2] Merritt v. Seaman, 6 N. Y. 168; Hallett v. Harrower, 33 Barb. 537; Barfield v. Price, 40 Cal. 535; Freeman v. Fulton Fire Ins. Co., 14 Abb. Pr. 407; Murray v. Church, 58 N. Y. 621; Bonsteed v. Garlinghouse, 60 Barb. 338.

[3] Fowler v. Westervelt, 40 Barb. 373; Agate v. King, 17 Abb. Pr. 59, distinguishing upon this point the decision in Gould v. Glass, 19 Barb. 179.

[4] Yates v. Kimmel, 5 Mo. 87. See this subject further considered *post*— Forms of Complaints: By and against particular persons, individually and in a representative and official capacity.

[5] Tolmie v. Dean, 1 Wash. Ter. 46.

[6] Butterfield v. Macomber, 22 How. Pr. 150; Wheelock v. Lee, 15 Abb., N. S., 24.

[7] Fowler v. N. Y. Indem. Ins. Co., 23 Barb. 151; Morange v. Mudge, 6 Abb. Pr. 243.

[8] Nelson v. Eaton, 16 Abb. Pr. 113. See *post*— Forms of Complaints: Actions by Assignees.

[9] Tolmie v. Dean, 1 Wash. Ter. 46.

[10] Id.

[11] Tiffany v. Williams, 10 Abb. Pr. 204.

[12] Mulliken v. Hull, 5 Cal. 245.

designation of the party plaintiff than the name of a copartnership firm, is deemed defective.[1]

§ 309. **The Same—Action by Corporation.**—In New York, where the plaintiff sues by an appropriate corporate name, it is not necessary to aver expressly that the plaintiff is a corporation; in such a case there is an implied averment to that effect.[2] This holding, however, was upon a demurrer assigning as the grounds thereof: 1. That it appeared from the pleading that the plaintiff had not legal capacity to sue; and, 2. That it did not contain facts constituting a cause of action. The general rule undoubtedly is, that a corporation plaintiff must aver that it is a corporation, the exception being where the defendant is estopped from denying the incorporation, as by having contracted with it by its corporate name.[3] Where plaintiff suing as supervisor, described himself in the title of the complaint as supervisor of North Hempstead, and commenced it, "The complaint of the plaintiff above named, as supervisor as aforesaid, shows," etc., it was held, on demurrer, a sufficient statement of the capacity in which he sued.[4]

The act of incorporation may be pleaded by reciting the title of the act and the date of its passage.[5] But it must be set forth with accuracy.[6] But the short mode of pleading permitted by this statute is not intended to relieve corporations from proving their existence.[7] Where the original act of plaintiff's incorporation is referred to in the complaint, a vague reference to other general statutes affecting it does not render the complaint demurrable.[9]

§ 310. **The Same—Permission to Sue.**—There are cases in which by reason of some special character, a party can not sue or be sued except by permission of the court. In such cases, the obtaining permission to sue should be alleged stating how, when, and from whom obtained, as in case of a

[1] Gilman v. Cosgrove, 22 Cal. 356; Walker v. Parkins, 9 Jur. 665; 14 Law Jour. R. 214, Q. B.; 1 New Pr. Cas. 199; 2 D. & L. 982. See *post*, Forms of Complaint—Actions by Corporations and Partners.

[2] Union M. Ins. Co. v. Osgood, 1 Duer, 707; The Bank of Genesee v. The Patchin Bank, 13 N. Y. (3 Kern.) 313; Phœnix Bank of N. Y. v. Donnell, 41 Barb. 571.

[3] Conn. Bank v. Smith, 17 How. Pr. R. 487.

[4] Smith v. Levinus, 4 Seld. 472.

[5] Cal. Code C. P., sec. 459; U. S. Bank v. Haskins, 1 Johns. Cas. 132.

[6] Union Bank v. Dewey, 1 Sandf. 509.

[7] Onondaga County Bank v. Carr, 17 Wend. 443; compare Bank of Watterville v. Beltser, 13 How. Pr. 270; Bank of Genesee v. Patchin Bank, 13 N. Y. (3 Kern.) 309.

[8] Sun Mutual Ins. Co. v. Dwight, 1 Hilt. 50. See *post*, Forms of Complaint—Actions by Corporations.

receiver;[1] or of a guardian of an habitual drunkard;[2] or of a lunatic.[3]

§ 311. **Second Subdivision—Statement of cause of Action.**—The complaint should state expressly and in direct terms the facts constituting the cause of action, and leave no essential fact in doubt, or to be inferred or deduced by argument from the other facts stated, as inference, argument, or hypothesis can not be tolerated in a pleading.[4] A cause of action being the right a person has to institute and carry through a proceeding,[5] and as the object of the complaint is to present the facts upon which the action is founded in ordinary and concise language,[6] the manner of the statement of those facts becomes a matter of importance, not only in reference to the facts which should be alleged, but of such facts as need not be alleged and which ought to be omitted from the complaint.

It is not in general necessary to make it appear on the face of a complaint that the court has jurisdiction of the person or of the subject-matter of the action.[7] It is, however, held that in an action against a foreign corporation, the complaint must allege that the plaintiff is a resident, or that the cause of action was, or the subject of it is situated in this state.[8]

Allegations in a complaint must be consistent with each other, and such as are not consistent, as well as such allegations as are absurd, and the truth of which is impossible, may be regarded as surplusage.[9] An averment at the end of a complaint that the defendant owes the plaintiff, is a mere conclusion of law and is not admitted by demurrer.[10] The complaint need not be dated, nor need it state the time when the action was commenced.[11] But the clerk shall indorse on the complaint the day, month, and year the same is filed.[12]

§ 312. **What Facts are to be Stated.**—Those facts, and

[1] Angel v. Smith, 9 Ves. 335; 3 Bro. C. Cas. 88; Merritt v. Lyons, 16 Wend. 410; Chautauque County Bank v. Risley, 19 N. Y. 376.

[2] Hall v. Taylor, 8 How. Pr. 428.

[3] Williams v. Cameron, 26 Barb. 172; Graham v. Scripture, 26 How. Pr. 501. See *post*, Forms of Complaints—Actions by Receivers and Guardians.

[4] Joseph v. Holt, 37 Cal. 250, citing Green v. Palmer, 15 id. 411.

[5] Meyer v. Van Collem, 28 Barb. 231.

[6] Cal. Code C. P., sec. 426.

[7] Koenig v. Nott, 8 Abb. Pr. 284; Spencer v. Rogers Loco. Works, 17 Id. 110.

[8] House v. Cooper, 16 How. Pr. 292.

[9] Sacramento County v. Bird, 31 Cal. 66.

[10] Millard v. Baldwin, 3 Gray, 484; Codding v. Mansfield, 7 Gray, 272; 13 Id. 392.

[11] Maynard v. Talcott, 11 Barb. 569.

[12] Cal. Code, sec. 406; and codes of Nevada, Idaho, Arizona, etc.

those only, should be stated, which constitute the cause of action;[1] and the kind of relief should be explicitly demanded.[2]

All the material facts out of which the cause of action arose ought to be stated, and none others;[3] and they should be stated in an intelligible and issuable form, capable of trial;[4] but a defective allegation of a fact may be cured by default or verdict:[5] Thus, a statement in a complaint that the contract sued on was made payable in a specific kind of money, is an allegation of a material fact.[6]

It is laid down as a rule that the complaint must contain all the facts which, upon a general denial, the plaintiff will be bound to prove in the first instance, to protect himself from a nonsuit, and show himself entitled to a judgment.[7] And this statement must be made without unnecessary repetition.[8]

The statute in this respect is only declaratory of the common law,[9] and is applicable as well to every description of pleading under the code, whether in law or equity, all distinctions in the form of actions having been abolished.[10] This rule governs all cases of pleading, legal and equitable.[11]

A complaint is materially defective if, to lay the foundation of a recovery, the proof must go further than the allegations it contains.[12] It must be so framed "as to raise upon its face the question whether, admitting the facts stated to be true, the plaintiff is entitled to judgment, instead of leaving that question to be raised or determined upon the trial.[13] For where a complaint shows no legal cause of action on its face, a judgment by default can no more be taken than it can be over a general demurrer.[14]

[1] Green v. Palmer, 15 Cal. 413; Wilson v. Cleaveland, 30 Id. 192; Racouillat v. Rene, 32 Id. 455; Buddington v. Davis, 6 How. Pr. 402.

[2] Bankston v. Farris, 26 Mo. 175; Biddle v. Boyce, 13 Id. 532.

[3] Hentsch v. Porter, 10 Cal. 555; Hicks v. Murray, 43 Id. 522; Brackett v. Wilkinson, 13 How. Pr. 102; Elwood v. Gardner, 45 N. Y. 349; Van Nest v. Talmage, 17 Abb. Pr. 99; Wade v. Rusher, 4 Bosw. 537.

[4] Boyce v. Brown, 7 Barb. 81; Los Angeles v. Signoret, 50 Cal. 298.

[5] Russell v. Mixer, 42 Cal. 475. See also Mercier v. Lewis, 39 Cal. 535; and Reynolds v. Hosmer, 45 Id. 616.

[6] Wallace v. Eldredge, 27 Cal. 498.

[7] 1 Van Santv. 215; Bristol v. The Rensselaer, etc., Co., 9 Barb. 158; Tallman v. Green, 3 Sandf. 457; Garvey v. Fowler, 4 Id. 665; 4 How. Pr. 98; Paff v. Kinney, 5 Id. 390; Turner v. Comstock, 1 Code R. 102; Tucker v. Rushton, 2 Id. 59; Russell v. Clapp, 3 Id. 64; Mann v. Morewood, 5 Sand. 564; Lienan v. Lincoln, 2 Duer, 670; Green v. Palmer, 15 Cal. 414.

[8] Lawrence v. Miller, 2 Comst. 253; N. Y. Code, 142; Laws of Oregon, sec. 65; Wash. Territory, sec. 53.

[9] Gladwin v. Stebbins, 2 Cal. 103.

[10] Piercy v. Sabin, 10 Cal. 27; Cordier v. Schloss, 12 Id. 147.

[11] Goodwin v. Hammond, 13 Cal. 169; Riddle v. Baker, Id. 302; Payne v. Treadwell, 16 Id. 243.

[12] Stanley v. Whipple, 2 McLean, 35.

[13] 1 Van Santv. 216.

[14] Abue v. Marr, 14 Cal. 211.

If the complaint contains one good count, though the findings of fact are defective, it will be sufficient;[1] since a plaintiff can only recover for such causes of action as are stated in his complaint,[2] he must show a good cause of action,[3] and facts sufficient to constitute it.[4]

§ 313. **Allegations on Information and Belief.**—Allegations made upon information and belief should be distinguished by the phrase, "alleges upon information and belief." The decisions on this point have been numerous and irreconcilable.[5] Section 524 of the new Code of Procedure in New York settles the question in that state. It provides: "The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded, for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter, must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information." The difference in the authorities upon this question has grown out of a very literal application of the rule that all facts must be positively alleged. When pleadings were not required to be verified, the rule was of easy application. But this rule related to the form of the allegation and not to the knowledge of the party. It is evident that a fact may be averred positively, so far as the form of the allegation is concerned, and yet the truth of the allegation rests upon information and belief. A failure to distinguish in the pleading between facts stated on personal knowledge and those stated on information and belief must of necessity defeat to a great extent the object to be attained by verification, unless the person verifying shall be held to have made every allegation upon personal knowledge.

The propriety and sufficiency of allegations upon information and belief, otherwise unobjectionable, have not been questioned in California, unless in injunction cases.[6]

[1] Lucas v. San Francisco, 28 Cal. 591; Hayden v. Sample, 10 Mo. 215; State v. Campbell, Id. 724; Marshall v. Bouldin, 8 Id. 244.

[2] Benedict v. Bray, 2 Cal. 256.

[3] Russell v. Ford, 2 Cal. 86; Little v. Mercer, 9 Mo. 216.

[4] Summers v. Farish, 10 Cal. 347; Maguire v. Vice, 20 Mo. 429.

[5] See Truscott v. Dole, 7 How. Pr. 221; St. John v. Beers, 24 Id. 377.

[6] See Patterson v. Ely, 19 Cal. 30 35, 40; Kirk v. Rhoads, 46 Id. 403; N. Y. Marbled L. Works v. Smith, 4 Duer, 362.

§ 314. **Joinder of Causes of Action.**—The codes of all the states make provisions for the joinder of causes of action. Such provisions differ in their details. In California, and in most of the other code states, it is provided that the plaintiff may unite several causes of action in the same complaint, where they all arise out of: (1) Contracts, expressed or implied; (2) Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; (3) Claims to recover specific personal property, with or without damages for the withholding thereof; (4) Claims against a trustee by virtue of a contract, or by operation of law; (5) Injuries to character; (6) Injuries to person; (7) Injuries to property. The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated. But an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.[1] In construing this provision of the code, it has been held that causes of action arising out of the same transaction, against the same parties, where all the defendants are interested in the same claim of right, and where the relief asked for in relation to each is of the same general character, may in general be united.[2] Thus, an action for damages and also for a penalty, in a suit against a sheriff for a failure to execute process, may be united.[3] So a complaint in ejectment may be for two separate and distinct pieces of land, but the two causes of action must be separately stated, and affect all the parties to the action, and not require different places of trial.[4] And under our system a cause of action in tort may be united with a cause of action on contract, if the two causes of action arise out of the same transaction.[5]

Each cause of action should be separately and distinctly stated.[6] And each separate and distinct proposition of each cause of action should be separately set forth, and logical order should be observed in the statement of the premises, leaving the conclusions of law deduced therefrom to be drawn by the court. The better practice is to number each cause of action, and

[1] California Code, Civil Proc., sec. 427

[2] Varick v. Smith, 5 Paige Ch. 137; Jones v. Steamship "Cortes," 17 Cal. 487.

[3] Pearkes v. Freer, 9 Cal. 642.

[4] Boles v. Cohen, 15 Cal. 151.

[5] Jones v. Steamship "Cortes," 17 Cal. 487.

[6] Boles v. Cohen, 15 Cal. 151; Sturges v. Burton, 8 Ohio St. 215.

each proposition of each cause of action.[1] The causes of action required to be separately stated are such as by law entitle the plaintiff to separate actions, and each of which would be a perfect cause of action in itself.[2] And such statement should begin with appropriate words to designate it as such.[3] Each statement must be complete in itself, or must be made so by express reference to other parts of the pleadings.[4] That reference may be made to other allegations was the rule at common law.[5] A complaint seeking to recover on two causes of action must show how much is due on each. In a word, each cause of action must be clearly and explicitly stated, and must be perfect in itself.[6]

§ 315. **Causes of Action Which can not be Joined.**— Causes of action arising under *different classes*, as specified in the provisions of the code quoted in the preceding section, can not be united in one action. So, inconsistent causes of action can not be united in the same complaint.[7] Nor can the pleader under the present system, any more than under the old, ask for two or more distinct kinds of relief, inconsistent with or repugnant to each other.[8] Thus, an action in ejectment for breach of condition, with damages for breach of covenant, is deemed incompatible.[9] So, an action in ejectment against vendor, and an equitable claim that vendor execute a conveyance, can not in general be united.[10]

A claim for the possession of real property, with damages for its detention, can not be joined in the same complaint, under any system of pleading, with a claim for consequential damages arising from a change of road, by which a tavern-keeper may have been injured in his business.[11] A complaint which joins an action of "*trespass quare clausum fregit*," ejectment, and prayer for relief in chancery, will be held bad on demurrer.[12] So,

[1] Benedict v. Seymour, 6 How. Pr. 298; Blanchard v. Strait, 8 Id. 83.

[2] Sturges v. Burton, 8 Ohio St. 215.

[3] Benedict v. Seymour, 6 How. Pr. 298; Lippincott v. Goodwin, Id. 242.

[4] Watson v. S. F. & H. B. R. R. Co., 41 Cal. 17; Ritchie v. Garrison, 10 Abb. Pr. 246.

[5] Freeland v. McCullough, 1 Den. 414; Crookshank v. Gray, 20 Johns. 344; Griswold v. Nat. Ins. Co., 3 Cow. 95; Loomis v. Swick, 3 Wend. 205; Porter v. Cummings, 7 Id. 172.

[6] Buckingham v. Waters, 14 Cal. 146; Clark v. Farley, 3 Duer, 645; Watson v. S. F. & H. B. R. R. Co., 41 Cal. 17.

[7] 1 Van Santv. 54, 55; Linden v. Hepburn, 3 Sandf. 668.

[8] 1 Van Santv. 55.

[9] Underhill v. Saratoga and Washington R. R. Co., 20 Barb. 455.

[10] Lattin v. McCarty, 17 How. Pr. 289; 8 Abb. Pr. 225. As to ejectment and equitable relief generally, see Onderdonk v. Mott, 34 Barb. 106.

[11] Bowles v. Sacramento Turnpike Co., 5 Cal. 224.

[12] Bigelow v. Cove, 7 Cal. 133; Nevada and Sacramento Canal Co. v. Kidd, 43 Id. 184; Budd v. Bingham, 18 Barb. 494; Cowenhoven v. City of Brooklyn, 38 Id. 9; Hotchkiss v. Auburn & Rochester R. R. Co., 36 Id. 600.

claims for injury to personal property, and for its possession, can not be united.[1] Enforcement of equitable lien, and demand for possession in replevin, can not be united.[2]

A count in *assumpsit* can not be joined with a count in *tort;* and upon trial the plaintiff may be compelled to elect upon which he will proceed.[3] But in California, where both arise out of the same transaction, they may be united. It is held in Pennsylvania that a count in *assumpsit* can not be joined with a count for a deceit; and where added after an award of arbitrators, and an appeal therefrom by the defendant, under a declaration containing a count for deceit only, it was properly stricken off by the court on the trial.[4]

Counts in debt and covenant can not be joined. Such a declaration is bad on general demurrer.[5] A claim on a demand for money had and received can not be joined with a claim to compel the delivery up of notes.[6] It seems that the vendor can not unite in the same action a claim against a broker for damages for fraudulent sale of land with a claim against a purchaser for reconveyance or accounting.[7] So a landlord can not demand an injunction against a breach of covenant in the same action in which he demands a forfeiture of the lease. Such reliefs are inconsistent.[8]

Claim for equitable relief against a corporation and one for damages against individual directors are incapable of joinder.[9] So, where the interests of the defendants are several, as in case of the several purchasers of securities, in an equitable suit to compel their surrender, the causes of action against the several purchasers can not be united.[10]

An individual and representative claim can not properly be joined in the same action.[11]

Complainant can not unite in one bill a demand that defend-

[1] Spalding v. Spalding, 1 Code R. 64; Smith v. Hallock, 8 How. Pr. 73.

[2] Otis v. Sill, 8 Barb. 102.

[3] Noble v. Laley, 50 Penn. 281; Childs v. Bank of Missouri, 17 Mo. 213; Luckey v. Vanderbilt, 10 How. Pr. 155; see Ford v. Mattice, 14 Id. 91; Dunning v. Thomas, 11 Id. 281.

[4] Pennsylvania R. R. Co. v. Zug, 47 Penn. 480.

[5] Brumbaugh v. Keith, 31 Penn. 327.

[6] Cahoon v. Bank of Utica, 3 Code R 110; Aleger v. Scoville, 6 How. Pr. 131.

[7] Gardner v. Ogden, 22 N. Y. 327.

[8] Linden v. Hepburn, 3 Sandf. 668; S. C., 5 How. Pr. 183; 9 N. Y. Leg. Obs. 80.

[9] House v. Cooper, 30 Barb. 157; 16 How. Pr. 292.

[10] Lexington and Big Sandy R. R. Co. v. Goodman, 25 Barb. 469; 15 How. Pr. 85; Hess v. The Buffalo and Niagara Falls R. R. Co., 29 Barb. 391; Clark v. Coles, 50 How. Pr. 178; Austin v. Monro, 47 N. Y, 360.

[11] Lucas v. N. Y. Cent. R R. Co., 21 Barb. 245; Hall v. Fisher, 20 Id. 441; Voorhis v. Child's Ex'r 17 N. Y. 354; Higgins v. Rockwell, 2 Duer, 650; Tracy v. Suydam, 30 Barb. 110; Brinkerhoff v. Brett, 22 How. Pr. 233; Gridley v. Gridley, 33 Barb. 250.

ant account individually for moneys received by him with a demand that he account as administrator or trustee.[1] So, a claim against surviving partners and executors of deceased partners can not be united unless the survivor is insolvent.[2]

Actions on contracts, injury to person or injury to property, are incompatible and can not be united, as it is essential that they should all belong to the same class.[3] Causes of action to recover damages for alleged injuries to the person and property of the plaintiff, and for false imprisonment of the plaintiff's person, for forcibly ejecting him from a house and premises alleged to have been in plaintiff's possession, and keeping him out of the possession thereof, can not be united.[4] So the tort of a husband and separate tort of wife can not be united.[5] A claim for damages for a personal tort can not be united with a demand properly cognizable in a court of equity in the same action.[6]

As a rule, personal actions *ex contractu* and *ex delicto* can not be united,[7] as the distinction between actions growing out of torts and those growing out of contracts must still be preserved.[8] It has been held, however, that a party whose property has been wrongfully taken, may waive the tort and sue in *assumpsit*.[9] But whichever ground of recovery the pleader adopts, the substantial allegations of the complaint in a given case must be the same under our practice as were required at the common law.[10]

A bill in equity is multifarious when several matters are united against one defendant, which are perfectly distinct and unconnected, or when relief is demanded against several defendants of several matters of a distinct and independent nature.[11] So, in an action against trustees of two separate estates.[12]

An action against a sheriff and his official bondsmen, alleging only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, is a mis-

[1] Warth v. Radde, 28 How. Pr. 230; 18 Abb. Pr. 396; Latting v. Latting, 4 Sandf. Ch. 31; Bartlett v. Hatch, 17 Abb. Pr. 461; see Burt v. Wilson, 28 Cal. 632, 639.

[2] McVean v. Scott, 46 Barb. 379.

[3] Hulce v. Thompson, 9 How. Pr. 113; Mayo v. Madden, 4 Cal. 27.

[4] McCarty v. Fremont, 23 Cal. 197.

[5] Malone v. Stilwell, 15 Abb. Pr. 421.

[6] Mayo v. Madden, 4 Cal. 27.

[7] White v. Snell, 5 Pick. 425; Boston v. Otis, 20 Id. 41.

[8] Knickerbocker v. Hall, 3 Nev. 194; Carson River Lumbering Co. v. Bassett, 2 Id. 249.

[9] Eversole v. Moore, 3 Bush, 49; *contra*, Ladd v. Rogers, 11 Allen, 209.

[10] Miller v. Van Tassel, 24 Cal. 463.

[11] Wilson v. Castro, 31 Cal. 420.

[12] Vial v. Mott, 37 Barb. 208.

joinder of causes of action.[1] So, a lessee and his surety can not be united in the same suit.[2]

A husband and wife may join in suit for her services, but when they sue together he can not join a claim of his own.[3] A suit by an infant coming of age, seeking to avoid two separate grants to different persons, and to recover possession, can not be brought in one action.[4]

A count on contract made by one defendant can not be joined with one made by all defendants.[5] Two claims, the one against both defendants for recovery of possession of real estate and damages, the other against one only for rents received, no connection existing between the same, can not be joined.[6]

A complaint setting forth a liability on the part of the defendant, partly joint and partly several, is fatally defective.[7] Or a claim arising out of joint liability on contract, with claim for joint and several liability sounding in tort.[8] Nor can an action be maintained against a defendant as sole debtor on one contract and joint debtor on another.[9]

A suit on a recognizance given before a justice, for the appearance of the defendant to answer a criminal charge. The complaint, after setting out the cause of action on the recognizance, avers that the defendant, S., to secure his sureties, executed a trust deed to T. of certain warrants and money. This deed provides that in case the recognizance be forfeited and the sureties become liable thereon, the trustee is to apply the property to the payment thereof, so far as it will go. The complaint asks to have this property so applied. It is a misjoinder of causes of action, the trust deed having nothing to do with the liability of the sureties.[10]

§ 316. **Splitting Demands.**—At law a creditor has not the right to assign the debt in parcels, and thus by splitting up the cause of action subject his debtor to costs and expenses of several suits.[11] But although such assignment is not good at law without consent of the debtor, it is valid in equity, and in an action thereon it is not necessary to aver consent. So a prom-

[1] Ghirardelli v. Bourland, 32 Cal. 585.

[2] Phalen v. Dingee, 4 E. D. Smith, 379; Tibbitts v. Perey, 24 Barb 39.

[3] Avogadro v. Bull, 4 E. D. Smith, 384.

[4] Voorhies v. Voorhies, 24 Barb. 150.

[5] Moore v. Platte Co., 8 Mo. 467; Doan v. Holly, 25 Mo. 357; S. C., 26id. 186.

[6] Tompkins v. White, 8 How. Pr. 520.

[7] Lewis v. Acker, 11 How. Pr. 163.

[8] Harris v. Schultz, 40 Barb. 315.

[9] Barnes v. Smith, 16 Abb. Pr. 420; Warth v. Radde, 28 How. Pr. 230.

[10] The People v. Skidmore, 17 Cal. 260.

[11] Marziou v. Pioche, 8 Cal. 536; but see McEwen v. Johnson, 7 Id. 260; Grain v. Aldrich, 38 Id. 514.

issory note can not be the foundation of two suits, each for a part of the note.[1] But there is no case or dictum requiring a party to join in one action several distinct causes of action. The plaintiff may elect to sue upon them separately,[2] even when they belong to the class of causes which might be joined, provided their identity is not the same.[3] But an attorney suing for services must include his entire demand in one action.[4] So a joint cause of action vested in two or more, can not be split.[5] But any demand may be split with the consent or assent of the defendant.[6]

The failure to join several causes of action arising out of the same transaction may sometimes operate as a bar to the subsequent assertion of the omitted demands.[7] Thus in a suit in trover for the recovery of bed-quilts, when bed and bed-quilts were taken at the same time, a recovery of the quilts was a bar to an action for the recovery of the bed.[8] So an action for the recovery of one barrel of potatoes was a bar to a suit for the recovery of two barrels, all sold at the same time.[9] So, in case of sale of hay under a contract, to be delivered in parcels.[10] So, also, judgment in an action for a breach of one covenant of a lease is a bar to a recovery on the breach of another covenant in the same lease, committed before the first suit was commenced.[11]

§ 317. **Actions for Debt.**—A debt is a sum of money due upon a contract, express or implied.[12] Standing alone, the word "debt" is as applicable to a sum of money which has been promised at a future day, as to a sum now due and payable. But a sum of money payable on a contingency does not become a debt till the contingency has happened.[13] So, the wages of a seaman is not a debt till the vessel has arrived.[14] So of a contract between shippers and owners, which does not become a debt till the termination of the voyage.[15] So of a covenant to pay rent quarterly, from which the tenant is liable to be discharged by quitting the premises, or by assigning the

[1] Miller v. Covert, 1 Wend. 487.
[2] Phillips v. Berick, 16 Johns. 140; Secor v. Sturgis, 16 N. Y. 554.
[3] Staples v. Goodrich, 21 Barb. 317.
[4] Beekman v. Platner, 15 Barb. 550.
[5] Coster v. N. Y. & E. R. R. Co., 6 Duer. 46.
[6] Cornell v. Cook, 7 Cow. 310; Secor v. Sturgis, 16 N. Y. 559.
[7] Phillips v. Berick, 16 Johns. 136; Bendernagle v. Cocks, 19 Wend. 207; Hopf v. Meyers, 42 Barb. 270.
[8] Farrington v. Payne, 15 Johns. 432.
[9] Smith v. Jones, 15 Johns. 229.
[10] Miller v. Covert, 1 Wend. 487.
[11] Bendernagle v. Cocks, 19 Wend. 207; Stuyvesant v. Mayor of New York, 11 Paige Ch. 414.
[12] Perry v. Washburne, 20 Cal. 350.
[13] People v. Arguello, 37 Cal. 524.
[14] Wentworth v. Whittemore, 1 Mass. 471.
[15] Davis v. Ham, 3 Mass. 33; Frothingham v. Haley, Id. 68.

term, with lessor's consent, or the lessee may be evicted therefrom by title paramount.[1] But a debt payable in any event, but not yet due, is a debt, *debitum in præsenti, solvendum in futuro.*[2]

The action of debt lies to recover a certain specific sum of money, or a sum that can readily be reduced to certainty.[3] It is a species of contract whereby a right to a certain sum of money is mutually acquired and lost;[4] or, more properly, the result of such contract.[5] Counts in *indebitatus assumpsit*, heretofore known as the common counts, may be stated separately, or may be all united in the same complaint. It is only necessary to aver an indebtedness, and that said indebtedness has not been paid.

The action of debt is founded upon contract; the action of *assumpsit*, upon the promise.[6] An action of debt founded on a statute is considered as an action founded on a specialty, but it is not of equal dignity with a debt due by bond.[7]

The action of debt will lie in general where the sum is certain, and it is the duty of the defendant to pay the amount to the plaintiff.[8] But it may also be brought for a sum capable of being certainly ascertained, though not ascertained at the time of action brought.[9]

Indebitatus assumpsit lies to recover the stipulated price due on a contract not under seal, where the contract has been completely performed.[10] The action of debt lies upon a judgment,[11] or on a decree.[12] An indorsee of a note can have debt against the maker,[13] or against a remote indorser.[14] The action of debt lies on a penalty, whether it be a statutory penalty, although uncertain,[15] if the duty or penalty be capable of being reduced

[1] Wood v. Partridge, 11 Mass. 488.

[2] People v. Arguello, 37 Cal. 524.

[3] 1 Bur. Law Dict. 450; 3 Bl. Com. 154; 3 Steph. Com 481; Browne on Actions, 333; Smith on Contracts, 497.

[4] 2 Bl. Com. 464.

[5] 2 Steph. Com. 187.

[6] Metcalf v. Robinson, 2 McLean, 363.

[7] United States v. Lyman, 1 Mason, 482.

[8] Home v. Semple, 3 McLean, 150; Bank of Circleville v. Iglehart, 6 Id. 568.

[9] United States v. Colt, Pet. C. Ct. 145.

[10] Bank of Columbia v. Patterson, 7 Cranch, 299; Chesapeake Canal Co. v. Knapp, 9 Pet. 541; Hyde v. Liverse, 1 Cranch C. Ct. 408; Brockett v. Hammond, 2 Id. 56; Pipsico v. Bontz, 3 Id. 425; to the contrary, Krouse v. Deblois, 1 Id. 138; Talbot v. Selby, Id. 181.

[11] Stuart v. Lander, 16 Cal. 372; see also Ex parte Prader, 6 Id. 239; Lawrence v. Martin, 22 Id. 173; Pennington v. Gibson, 16 How. U. S. 65.

[12] Pennington v. Gibson, 16 How. U. S. 65; Thompson v. Jameson, 1 Cranch, 282.

[13] 12 Johns. 90; Willmarth v. Crawford, 10 Wend. 341.

[14] Onondaga Co. Bank v. Bates, 3 Hill, 53.

[15] United States v. Colt, Pet. C. Ct. 145.

to a certainty,[1] or for the penalty of an agreement.[2] And in the latter case, a sum less than the penalty may be recovered.[3] Such action lies to recover rent on an expired lease.[4] And so where there is a demise not under seal, whether against lessee or lessee's assignee, debt for use and occupation will lie.[5] The act of covenant lies where a party claims damages for a breach of covenant, that is, of a promise under seal, as distinguished from actions of *assumpsit*, or for breach of contracts not under seal.[6]

§ 318. **Actions for Breach of Contract.** — The requisites which must carefully be observed in a complaint on contracts are: 1. The existence of the contract sued upon, and its terms clearly shown upon the face of the pleading; 2. Performance or readiness to perform, and a tender of performance on the part of the plaintiff, must be shown; 3. The breach must be clearly apparent; 4. Special damages resulting from the breach must be specifically and clearly averred.

§ 319. **The Same — Pleading Contract.** — The existence of the contract should be stated, and if it was an alternative or a conditional engagement, or qualified by exceptions, this should appear in the complaint.[7]

If the contract be in writing, it may be pleaded *in hæc verba*, or the pleader may set forth its legal effect. The former mode, however, is preferable as being more consistent with the present system of pleading.[8] The rule which permits the pleader to declare upon a contract *in hæc verba* must be limited to cases where the instrument set out contains the formal contract, showing in express terms the promises and undertakings on both sides.[9]

It is by far the better practice to plead a contract, if it be a written contract, by setting forth a copy of it or by annexing a copy to the complaint,[10] the same as in actions upon written instruments for the payment of money only.[11] If declared on according to its legal effect, the defendant may, by the rule of the common law in a proper case, crave oyer of the instrument; and if it appears that its provisions have been misstated, he may

[1] Bullard v. Bell, 1 Mason, 213.
[2] Martin v. Taylor, 1 Wash. C. Ct. 1.
[3] Id.
[4] Thursby v. Plant, 1 Saund. 233; Woodf. 323; Norton v. Vultee, 1 Hall, 384.
[5] McKeon v. Whitney, 3 Den. 452.
[6] Steph. Pl. 18.
[7] Hatch v. Adams, 8 Cow. 35; Stone v. Knowlton, 3 Wend. 374; Lutweller v. Linnell, 12 Barb. 512; Crane v. Maynard, 12 Wend. 408.
[8] See Stoddard v. Treadwell, 26 Cal. 300; Murdock v. Brooks, 38 Id. 603.
[9] Joseph v. Holt, 37 Cal. 253.
[10] Fairbanks v. Bloomfield, 2 Duer, 349.
[11] Swan on Pl. 204.

set out the contract *in hæc verba*, and demur the ground of the variance.[1]

It is not necessary that the words of a deed or other written instrument should be given; the substance is sufficient. But whatever is pleaded should be truly pleaded.[2] For where a pleading purports to recite a deed or record *in hæc verba*, trifling variances, if material, have been deemed fatal.[3]

Records and papers can not be made a part of a pleading by merely referring to them, and praying that they may be taken as a part of such pleading, without annexing the originals or copies as exhibits, or incorporating them, so far as to form a part of the record in the cause.[4] The party, by pleading a record with the words, "as appears by the record," or "as appears of record," proffers that issue, and it is incumbent on him to maintain it literally; and this is true where the averment has reference to particulars which need not, as well as to those which must be specifically stated upon the record.[5] In an action of foreclosure, where the complaint has a copy of the mortgage annexed, and to which it refers, a correct description of the land in the mortgage is sufficient for the purpose of the suit.[6]

If time is stated, it should be when the debt became due, though time is only material when it is sought to recover interest.[7] Thus, in an action on the case for failure to perform a parol contract, the time of making it is not material.[8] The plaintiff may, in fact, allege any time after the debt accrued and give evidence of the true time.[9]

If the time of performance is not stated, the law imports a reasonable time therefor.[10] In *assumpsit* on a promise to pay a debt due by the promisor, if the plaintiff would give time, whenever the promisor should be able, the declaration need not state that the plaintiff accepted the promise. It is sufficient to aver that the time was given and the ability of the defendant.[11]

Although the forms of the action of *assumpsit* and of the pleadings therein have been abolished, yet the distinction between an express and implied *assumpsit* remains, and it is only on the-

[1] Stoddard v. Treadwell, 26 Cal. 300.
[2] Ferguson v. Harwood, 7 Cranch, 408.
[3] Id.
[4] People v. De la Guera, 24 Cal. 78.
[5] Purcell v. Macnamara, 9 East, 160; Whittaker v. Branson, 2 Paine, 209.
[6] Emeric v Tams, 6 Cal. 155.
[7] Lyon v. Clark, 4 Seld. 148. But see Norris v. Elliot, 39 Cal. 74; Todd v. Myres, 40 Id. 355.
[8] Scull v. Higgins, Hempst. 90; compare McLaughlin v. Turner, 1 Cranch C. Ct. 476.
[9] Moffet v. Sackett, 18 N. Y. 522; Farran v. Sherwood, 17 Id. 227; Wetmore v. San Francisco, 44 Cal. 299.
[10] Fickett v. Brice, 22 How. Pr. 194.
[11] Lonsdale v. Brown, 4 Wash C. Ct. 148; compare Rice v. Barry, 2 Cranch C. Ct. 447.

ory of an implied *assumpsit*, "inferred from the conduct, station, or mutual relation of the parties," that justice can be enforced and the performance of a legal duty compelled. It is no longer necessary in such a case for the plaintiff to allege in his complaint any promise on the part of the defendant; but he must state facts which if true according to the well-settled principles of law, would have authorized him to allege, and the court to infer, a promise on the part of the defendant in a case in *assumpsit*.[1]

The allegation that the defendant "made his contract in writing," imports a delivery,[2] and this need not ordinarily be alleged,[3] nor need it be alleged that it was accepted.[4] Exceptions, however, exist to this rule, as in case of instruments in trust, for benefit of others, where delivery should be alleged. Thus in case where a grantor handed a deed purporting to convey land to his son to a third party, saying: "Here is a writing in [my son's] favor. It is for him, but I don't want him to have it in his hands just now; I want you to take it and keep it in your possession till a proper time to produce it. If I keep it in my hands I don't know who will get hold of it," and gave his reasons, there being no privity between the depositary and the grantee; on the death of the grantor, it was held that there had been no delivery.[6]

§ 320. **Allegations of Promise.**—If there is an express promise, it should be properly alleged and proved. In such case, the promise is the fact constituting the cause of action. But if the promise is implied from the other facts alleged, it need not be averred. And in the absence of an express promise, every fact essential to fix the liability of the defendant should be stated; for where the plaintiff does not allege in his pleadings a contract or agreement, he can not recover upon it.[7]

A party who has wholly performed a special contract on his part, may count upon the implied agreement of the other party to pay the stipulated price, and is not bound to specially declare upon the agreement.[8]

In pleading a contract which the statute of frauds requires to

[1] Swan's Pl. 174; Farron v. Sherwood, 17 N. Y. 227; Byxbie v. Wood, 24 Id. 607.

[2] Prindle v. Caruthers, 15 N. Y. 425.

[3] Brinkerhoff v. Lawrence, 2 Sandf. Ch. 400; Peets v. Bratt, 6 Barb. 660; Tompkins v. Corwin, 9 Cow. 255.

[4] Gazley v. Price, 16 Johns. 267.

[5] Whitelock v. Fiske, 3 Edw. 131.

[6] Baker v. Haskell, 47 N. H. 479.

[7] Wilkins v. Stidger, 22 Cal. 285; Wills v. Wills, 34 Ind. 106; Farron v. Sherwood, 17 N. Y. 227; Jordan etc. Co. v. Morley, 23 Id. 552; Irwin v. Schultz, 46 Penn. 74.

[8] Allen v. Patterson, 3 Seld. 476; Keteltas v. Myers, 19 N. Y. 231; Moffet v. Sackett, 18 Id. 522; Hosley v. Black, 28 Id. 428; S. C., 26 How. Pr. 97; Todd v Huntington, 3 West Coast Rep. 331; Steeples v. Newton, 7 Or. 110; Tribou v. Strowbridge, Id. 156.

be in writing, *e. g.*, a contract relating to lands—it is not necessary to allege the facts relied on to take the case out of the statute. It is sufficient on demurrer to allege that a contract was made. Such an allegation is to be understood as intending a real contract—something which the law would recognize as such. There is no reason for departing, under the code, from the former well-settled rules in law and equity.[1] The existence of a writing in such case is a matter of evidence; it is not one of the pleadable facts.[2]

Thus a complaint upon an undertaking to answer for the debt of a third person is good, though it does not allege that either the promise or the consideration was in writing.[3] And the same rule is established in California.[4]

§ 321. **Consideration when must be Alleged.**—The essential element of every contract being the consideration, a proper statement in the complaint becomes a matter of great importance, while an averment of consideration in cases where it is implied by law, becomes surplusage, and should be avoided. The rule, however, is that the consideration must appear on the face of the complaint, either impliedly, as in cases of sealed instruments, where the seal imports consideration;[5] or the particular consideration on which the contract is founded must be expressly stated,[6] whenever proof of it is necessary to support the action,[7] for in its absence no cause of action can be maintained.[8]

In a suit upon an agreement under seal, the complaint setting out the agreement *in hæc verba* need not aver any consideration for the agreement. The seal imports a consideration.[9] But on a simple contract the law of pleading requires the complaint to state the particular consideration for the defendant's promise declared on.[10] And in all cases when the performance of the consideration is a condition precedent.[11] This rule has its exceptions, as in cases of bills of exchange and promissory

[1] Etling v. Vanderlyn, 4 Johns. 237; Meyers v. Morse, 15 Id. 425.

[2] Livingston v. Smith, 14 How. Pr. 490.

[3] State of Indiana v. Woram, 6 Hill, 33; and also in Wakefield v Greenhood, where it is held that though the contract must be in writing under a statute, yet it is not necessary in the complaint to show that fact.

[4] McDonald v. Mission View H. Assn., 51 Cal. 210.

[5] Wills v. Kempt, 17 Cal. 98; McCarty v. Beach, 10 Id. 461.

[6] 1 Ch. Pl. 293; Douglass v. Davie, 2 McCord, 218; Kean v. Mitchel, 13 Mich. 207, and cases there cited.

[7] 4 Johns. 280.

[8] Bristol v. The Rensselaer etc. Co. 9 Barb. 158.

[9] Willis v. Kempt, 17 Cal. 99; McCarty v. Beach, 10 Id. 461.

[10] Moore v. Waddle, 34 Cal. 145; Joseph v. Holt, 37 Id. 253.

[11] Moore v. Waddle, 34 Cal. 145.

notes, where the consideration is implied.[1] In California any written instrument is presumptive evidence of a consideration,[2] and the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.[3] Similar statutes have been passed in many of the states.[4]

To constitute a valuable consideration it is not necessary that money should be paid. It is sufficient that it has been expended on the faith of the contract.[5] The acknowledgment of one dollar is sufficient, whether actually paid or not.[6] The consideration of a written instrument may be inquired into.[7] It has been held that the allegation of a "good and valuable consideration" is not sufficient on demurrer, or to sustain a judgment by default; yet it is sufficient to sustain a verdict after trial upon the issues.[8]

If part of a consideration be merely voidable, the contract may be supported by the residue, if good *per se*. But if any part be illegal it vitiates the whole.[9] It is no objection that the direct consideration moves to a third person.[10] Nor is it an objection that it moves from a third party to the person who seeks to enforce it.[11]

The consideration must in all cases be legally sufficient to support the promise for the breach for which the action is brought.[12] If there is a benefit to the defendant and a loss to the plaintiff directly resulting from the promise in behalf of the plaintiff, there is a sufficient consideration to enable the latter to maintain an action.[13] The court will not inquire into the exact proportion between the value of the consideration and that of the thing to be done for it.[14]

The recital in a complaint of an executed or past consideration is not usually traversable, and requires little certainty,

[1] Moore v. Waddle, 34 Cal. 145; 7 N. Y. Leg. Obs. 149.

[2] Civil Code, sec. 1614.

[3] Civil Code, sec. 1615.

[4] Wag. Stat. 270, sec. 6; Caples v. Branham, 20 Mo. 248; Iowa Code, secs. 2112, 2114; Ky. Gen. Stat. 1873, p. 249; Kans. Gen. Stat. 1868, p. 183; Ind. Code Civ. Proc. 273.

[5] King v. Thompson, 6 Pet. 204.

[6] Dutchman v. Tooth, 5 Bing. N. C. 577; Lawrence v. McCalmount, 2 How. U. S. 426.

[7] See Code Civ. Proc. sec. 1962, and sec. 1963, subd. 39; see also Cravens v. Dewey, 18 Cal. 43; Peck v. Vandenberg, 30 Id. 12; Ingersoll v. Truebody, 40 Id. 603.

[8] Kean v. Mitchell, 13 Mich. 207.

[9] 1 Sandf. Pl. & Ev. 187; Cobb v. Cowdery, 40 Vt. 25.

[10] Townley v. Sumrall, 2 Pet. 170; but compare D'Wolf v. Raband, 1 Id 476.

[11] Raymond v. Pritchard, 24 Ind. 318.

[12] 1 Ch. Pl. 292; Bristol v. Van Rensselaer & Saratoga R. R. Co., 9 Barb. 158.

[13] Add. on Cont. 1002; Emerson v. Slater, 22 How. U. S. 43.

[14] 1 Pars. on Cont. 362; and authorities there cited.

either of name, place, person, or subject-matter,[1] although it should be known to both parties at the time of making the contract that the subject-matter is liable to a contingency by which it may be destroyed. If this contingency has already happened at the time, the agreement is without consideration.[2]

However strong may be one's moral obligation to do that which he agreed to do, it is only promises founded on the performance of duties actually agreed to be done, or imposed by law, which are regarded in law as binding. A promise by a party to do what he is bound in law to do, is an insufficient but not an illegal consideration.[7]

In contracts imposing a restraint on one of the parties contracting, there must not only be a consideration for the contract, but some good reason for entering into it, and it must impose no restraint upon one party which is not beneficial to the other.[4]

§ 322. **Alleging Performance of Contracts.**—In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.[5] The purpose of the statute is to avoid prolixity by permitting the plaintiff to aver generally, by grouping all the conditions to be performed by himself in a general averment that he has duly performed them all.[6] And it is a sufficient averment to allege that he had "fully and faithfully" performed the said contract on his part.[7] This general allegation of performance is confined to conditions contained in contracts. If the performance of a condition precedent, not contained in a contract, is necessary to create a cause of action, the facts showing such performance must be alleged.[8]

It seems that the word "party," in the provision of the code that "it may be stated generally that the party duly performed all the conditions on his part," means the person or persons by whom the conditions were to be performed, and the

[1] Gebhart v. Francis, 32 Penn. 78.
[2] Allen v. Hammond, 11 Pet. 63.
[3] Cobb v. Cowdery, 40 Vt. 25.
[4] California Steam Nav. Co. v. Wright, 6 Cal. 253.
[5] Cal. Code C. P., sec. 457.
[6] Woodbury v. Sackrider, 2 Abb. Pr. 402; Graham v. Machado, 6 Duer, 515; Rowland v. Phalen, 1 Bosw. 43.
[7] Rowland v. Phalen, 1 Bosw. 44; Griffiths v. Henderson, 49 Cal. 570.
[8] Spear v. Downing, 34 Barb. 523; Dye v. Dye, 11 Cal. 167; Rhoda v. Alameda Co., 52 Id. 350; People v. Jackson, 24 Cal. 632; Hatch v. Peet, 23 Barb. 580; Couch v. Ingersoll, 2 Pick. 292; Kane v. Hood, 13 Id. 281; Pomroy v. Gold, 2 Met. 500.

plaintiff in the suit is not necessarily the person who is the party to the contract. Upon a liberal construction, the statute means that it may be stated generally that the person or persons by whom the conditions were to be performed, have duly performed, etc.[1]

In an action on a contract by which the plaintiff had bound himself to do certain acts, and to procure third parties to do certain acts, the complaint alleging performance on their part, in the following form: And the plaintiff further says, that he and those on whose behalf the agreement was made and entered into by him have fully and faithfully performed and fulfilled all and singular the covenants and agreements in the said agreement contained, on the part of the said plaintiff and those on whose behalf the said agreement was made and entered into by him, as aforesaid, was held sufficient.[2] Such general averment imports a sufficient statement of being ready to do all things necessary in the future.[3]

And where certain work was to be done by the defendant, for the government, and certain things were to be done by the plaintiff to enable the defendant to perform his contract, the declaration must show that the precedent acts were done by the government, according to the terms of the contract.[4]

Performance must be averred according to the intent of the parties. Thus, a vendor of land who sues upon an agreement of sale containing a covenant on his part that he "will make a deed for the property," must aver and prove not merely his readiness to "deliver a deed," but that he had a good title, free of incumbrance, which he was ready and willing to convey by a legal deed.[5]

In an action of covenant on a contract to deliver merchandise at any place between certain points on a river, to be designated by the party to whom the delivery was to be made, the omission of such party to designate the place did not prevent the other from making a delivery at any convenient point he might select. The declaration need not aver that a place of delivery was designated, nor that notice of a place for the delivery of the merchandise was given. An issue formed as to such notice is immaterial.[6]

[1] Rowland v. Phalen, 1 Bosw. 43.
[2] Id.
[3] Williams on Pl. 117, n.; Bentley v. Dawes, 9 Exch. 666.
[4] U. S. v. Beard, 5 McLean, 441; compare Hart v. Rose, Hempst. 268.
[5] Washington v. Ogden, 1 Black. U. S. 450; Prewett v. Vaughn, 21 Ark. 417.
[6] Hartfield v. Patton, Hempst. 268.

An averment of performance is always made in the declaration upon contracts containing undertakings; and that averment must be supported by proof.[1] In pleading title to land under an act of the legislature which prescribes conditions upon the performance of which the title may be recovered, it is necessary to aver a performance of all the acts required by the statute.[2]

§ 323. **Alleging Non-performance.**—When performance is impracticable, such fact may be shown under an excuse for non-performance.[3] As from sickness or death.[4] Or by act of law.[5] Or by casualty of fire.[6] In such cases, the excuse for non-performance must be shown.[7] If performance has been prevented or interrupted by an act of the adverse party, or where a waiver thereof may be inferred, an averment of facts constituting the excuse is sufficient.[8] In such cases performance need not be alleged.[9] Where the conditions contained in the contract have been modified, or plaintiff has become excused from them, an averment of performance is not proper; the modification or excuse should be stated.[10] For under a complaint setting out a contract and, averring its performance by the plaintiff, evidence in excuse for non-performance is not admissible; yet this rule becomes of little importance in view of the power of amendment given to the court by the code.[11]

§ 324. **Alleging Concurrent Acts.**—In an action for breach of contract, the performance of a concurrent act, which the contract expressly, or by implication, devolved on the plaintiff, must be averred.[12] So where a contract is executory, a performance, or tender of performance, or a readiness and willing-

[1] Bank of Columbia v. Hagner, 1 Pet. 455; United States v. Arthur, 5 Cranch U. S. 257; compare Beale v. Newton, 1 Id. 404; Savary v. Goe, 3 Wash. 140.

[2] People v. Jackson, 24 Cal. 632.

[3] Wolfe v. Howes, 24 Barb. 174, 666.

[4] Wolfe v. Howes, 24 Barb. 174, 666; Fahy v. North, 19 Id. 341.

[5] Jones v. Judd, 4 Comst. 411.

[6] Lord v. Wheeler, 1 Gray, 282.

[7] Newcomb v. Brackett, 16 Mass. 166; Baker v. Fuller, 21 Pick. 318.

[8] For example see Clarke v. Crandall, 27 Barb. 73; Crist v. Armour, 34 Id. 378; Rivara v. Ghio, 3 E. D. Smith, 264; Little v. Mercer, 9 Mo. 216.

[9] Oakley v. Morton, 1 Kern. 33; Hosley v. Black, 26 How. Pr. 97; Holmes v. Holmes, 5 Seld. 525.

[10] Oakley v. Morton, 11 N. Y. 25.

[11] California Code C. P., secs. 472, 473; sec. 173 of the N. Y. Code: Hosley v. Black, 26 How. Pr. 97. Of the rule requiring full performance, except where sufficient excuse is shown, see Wolfe v. Howes, 20 N. Y. 197. And that no recovery can be had for part performance of conditions precedent, consult Sickles v. Pattison, 14 Wend. 257; M'Millan v. Vanderlip, 12 Johns. 165; Reab v. Moore, 19 Id. 337; Lantry v. Parks, 8 Cow. 63; Oakley v. Morton, 1 Kern. 25.

[12] Lester v. Jewett, 1 Kern. 453; Considerant v. Brisbane, 14 How Pr. 487.

ness to perform, on the part of the plaintiff, must be shown in the complaint.[1]

A tender of performance, or a readiness and willingness to perform, is a substitute for the general allegation of performance in such cases as it may be required. It may also be alleged that the plaintiff offered to perform.[2] In England, a general averment of readiness and willingness is sufficient.[3] So also in Ohio.[4] And such tender or offer of performance must be proved.[5] But an offer of performance is of no effect if the the person making it is not able and willing to perform according to the offer.[6]

In cases where the performance on the part of the plaintiff depends upon acts previously to have been done on the part of the defendant, an averment of readiness and willingness will be sufficient.[7] So where there are mutual promises, not dependent on each other, the omission to state in the declaration performance of that made by the plaintiff, is cured by the verdict.[8]

If mutuality exists at the inception of the contract, or at the time the contingency happens, no subsequent changes can destroy the contract, if the party has performed all the conditions on his part.[9] In an executory contract for the sale of an article to be paid for on delivery, the obligation for one party to pay, and the other to deliver, are mutual and dependent; and the seller must show that he was ready and offered to deliver the goods.[10] But where there has been part performance, a special allegation is not necessary.[11] In cases where mutuality exists in the conditions of a contract, neither party can maintain an action against the other for a breach of contract, without showing performance or tender of performance on his part.[12] But

[1] Barron v. Frink, 30 Cal. 486; Englander v. Rogers, 41 Id. 220; Van Schaick v. Winne, 16 Barb. 94; Beecher v. Conradt, 3 Kern. 110; Bronson v. Wiman, 4 Seld. 188; Tinney v. Ashley, 15 Pick. 546.

[2] See Williams v. Healey, 3 Den. 363; Crandall v. Clark, 7 Barb. 169; Clark v. Crandall, 27 Id. 73.

[3] Rust v. Nottridge, 1 Ellis & Bl. (Q. B.) 99; Bentley v. Dawes, 9 Exch. Welsb. H. & G. 666.

[4] Swan on Pl. 206; Nathan v. Lewis, 1 Handy, 242.

[5] Goodwin v. Lynn, 4 Wash. C. Ct. 714.

[6] Cal. Civil Code, sec. 1495.

[7] West v. Emmons, 5 Johns. 179.

[8] Corcoran v. Dougherty, 4 Cranch C. Ct. 205.

[9] Sugd. on Vend. 194; 1 Ves. 218; Mortlock v. Buller, 10 Ves. jun. 315; Lawrenson v. Butler, 1 Schoales & L. 19; Walton v. Coulson, 1 McLean, 120.

[10] Barron v. Frink, 30 Cal. 486; Gibbons v. Scott, 15 Id. 284; 1 Saud. Pl. & Ev. 190; Englander v. Rogers, 41 Cal. 420; Considerant v. Brisbane, 14 How. Pr. 487; Dunham v. Pettee, 4 E. D. Smith, 500; Fickett v. Brice, 22 How. Pr. 194.

[11] Grant v. Johnson, 5 Barb. 161; Wallis v. Warren, 13 Law Jour. Rep. Ex. 449; 14 Law Times, 108; 7 Dowl. & L. 60; 4 Ex. 364.

[12] Porter v. Rose, 12 Johns. 209; Gazley v. Price, 16 Id. 267; Parker v. Parmele, 20 Id. 130; Topping v. Root, 5 Cow. 404; Walden v. Davison, 11 Wend. 67; Lester v. Jewett, 11 N. Y.

where the covenants of an agreement are independent, the plaintiff can not support his action as to them without showing performance of every affirmative covenant on his part, and in such a case it is competent to the defendant to prove a breach of such as are negative.[1]

Thus where it was agreed that plaintiff, in consideration of the payment of a certain sum and the delivery of certain notes on a certain day, would make a certain assignment to defendant, plaintiff in an action to recover the money need not allege performance or offer of performance.[2]

But if notice is necessary to give a right of action, such notice must be specially averred.[3] And an averment of facts "which defendant well knew" is not sufficient.[4] Otherwise if knowledge only is necessary to fix the liability; as for keeping mischievous animals;[5] against a municipal corporation for defect in a grating over an area in a sidewalk,[6] and other like cases.

So, also, whenever a request is necessary to give a party a right to sue, it must be specially averred;[7] and where the statute prescribes conditions precedent to the acquirement of a right, the performance of those conditions must be specifically averred, and the facts showing such performance must be pleaded.[8]

But in an action by a purchaser to recover money paid in part execution of a contract rescinded by the vendor, an allegation of tender or readiness to pay the whole price is not necessary.[9] So, on a contract for wheat to be delivered on demand, it was not necessary to aver a tender.[10] And under an averment of tender, the plaintiff may prove a waiver of it by defendant.[11]

§ 325. **Alleging Breach of Contract.**—A complaint for breach of contract must state a breach in unequivocal language.[12] A general allegation, however, will be sufficient to

453; People v. Edmonds, 15 Barb. 359; Culver v. Burgher, 21 Id. 321; Daud v. King, 2 Pick. 155; Fickett v. Brice, 22 How Pr. 194; to the same effect, Frey v. Johnson, Id. 316; Englander v. Rogers, 41 Cal. 420.

[1] Webster v. Warren, 2 Wash. C. Ct. 456.

[2] Smith v. Betts, 16 How. Pr. 251.

[3] Bensley v. Atwill, 12 Cal. 231; Colt v. Root, 17 Mass. 229; Hobart v. Hilliard, 11 Pick. 144.

[4] Colchester v. Brooke, 7 Q. B. 339; S. C., 53 Eng. Com. L. 339.

[5] Fairchild v. Bentley, 30 Barb. 147.

[6] McGinity v. Mayor of New York, 5 Duer, 674.

[7] Ramsey v. Waltham, 1 Mo. 395; Ferner v. Williams, 37 Barb. 9.

[8] People v. Jackson, 24 Cal. 632.

[9] Main v. King, 8 Barb. 535; Faucher v. Goodman, 29 Id. 316; McKnight v. Dunlop, 4 Id. 36.

[10] Crosby v. Watkins, 12 Cal. 85.

[11] Holmes v. Holmes, 5 Seld. 525.

[12] 1 Van Santv. 222; Moore v. Besse, 30 Cal. 570; Schenck v. Naylor, 2 Duer, 675; Van Schaick v. Winne, 16 Barb. 89.

admit proof, and will only be obnoxious to a motion to render it more certain.[1]

Thus where the covenant describes a specific act, the breach may be averred in the language of the covenant; but if a number of acts are included in one phrase, the complaint must set forth the breach of each particular act upon which the plaintiff relies with particularity.[2] For when a party relies upon any breaches of an agreement as the foundation of an action, he must set forth in his pleading sufficient of the agreement to make it appear to the court that the breaches complained of do actually exist, and to what extent.[3] If the promise contained an exception or proviso, it must be stated.[4] And on a contract containing various undertakings, the plaintiff complaining of the breach of one, thereby waives any right as to the others.[5]

§ 326. **Alleging Special Damages.** — For the breach of a contract an action lies, though no actual damages be sustained.[6] And damages which materially and necessarily arise from the breach of the contract need not be stated, as they are covered by the general damages laid in the declaration; but special damages must be specially stated.[7] It is sufficient, so far as the demurrer is concerned, to aver in the complaint the contract, the breach complained of, and the general damages.[8] But the omission to aver specially the damages laid in the complaint, is waived by going to trial without objection.[9] In an action for special damages for injuries, such damages as are the natural although not the necessary result of the injury must be specially stated, and the facts out of which they arise must be specially averred in the complaint.[10] Thus a jury can not give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters.[11]

The want of any averment of special damages can not be reached by demurrer. Such averment is only necessary where the right of action itself depends upon the special injury received.[12] Matters in aggravation of damages need not be

[1] Trimble v. Stilwell, 4 E. D. Smith, 512.

[2] Wolfe v. Luyster, 1 Hall, 146; Brown v Stebbins, 4 Hill, 154.

[3] Lynch v. Murray, 21 How. Pr. 154.

[4] Latham v. Rutley, 2 Barn. & Cress. 20; Jones v. Cowley, 4 Id. 446; Tempany v. Burnand, 4 Camp. 20.

[5] Chinn v. Hamilton, Hempst. 438.

[6] McCarty v. Beach, 10 Cal. 461.

[7] Bas v. Steele, 3 Wash. C. Ct. 381.

[8] Barber v. Cazalis, 30 Cal. 92.

[9] Neary v. Bostwick, 2 Hilt. 514.

[10] Stevenson v. Smith, 28 Cal. 102; Cole v. Swanston, 1 Id. 51; Squier v. Gould, 14 Wend. 159; Strang v. Whitehead, 12 Id. 64; 1 Chit. Pl. 371; Sedg. on Dam. 67; Say on Dam. 313 Tuolumne Water Co. v. Columbia and Stanislaus Water Co., 10 Cal. 193.

[11] Dabovich v. Emeric, 12 Cal 171.

[12] McCarty v. Beach, 10 Cal. 461.

alleged; the *quo animo* may be proved without being pleaded,[1] and therefore should not be pleaded.[2]

§ 327. **Allegations in Actions for Injuries Resulting from Negligence.**—Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but is always relative to some circumstances of time, place, or person.[3] The prudence and propriety of men's actions are not judged by the event, but by circumstances under which they act. If they conduct themselves with reasonable prudence and good judgment, they are not to be made responsible because the event, from causes which could not be foreseen nor reasonably anticipated, has disappointed their expectations.[4] Where the safety of human life is in question, a very high degree of care is required.[5] But a casualty happening without the will and without the negligence or other default of the party, is, as to him, an inevitable casualty.[6] Ordinary care or common prudence, is such a degree of care and caution as will be in due proportion to the injury or damage to be avoided.[7] Thus, the question of negligence must depend upon the facts of the case, and it is not an abstract question of law.[8] Hence it will not be necessary in a complaint to aver the degrees of negligence in each case, as they are matters of proof to be decided from the facts stated.[9] Negligence implies gross as well as ordinary negligence; and a general averment of negligence is all that is required.[10] If an employment requires skill, failure to exert it is culpable negligence, for which an action lies.[11]

In New York, in an action for damages caused by negligence, it must appear that the plaintiff's acts or omissions did not con-

[1] Rustell v. Macquister, 1 Camp. 49 Slack v. McChesney, 2 Yates, 473; Wallis v. Mease, 3 Binney, 546; Kan v. McLaughlan, 2 Serg. & R. 469.

[2] Warne v. Croswell, 2 Stark. 457; Moloney v. Dows, 15 How. Pr. 265; see, however, Root v. Foster, 9 Id. 37; Brewer v. Temple, 15 Id. 286.

[3] Richardson v. Kier, 34 Cal. 63.

[4] The Amethyst, Davies, 20; 2 N. Y. Leg. Obs. 312.

[5] Castle v. Duryea, 32 Barb. 480.

[6] 1 T. R. 27; Hodgson v. Dexter, 1 Cranch C. Ct. 109; The Lotty, Olc. 329.

[7] Ernst v. Hudson River R. R. Co., 35 N. Y. 9.

[8] Baxter v. Second Ave. R. R. Co., 30 How. Pr. 219; Welling v. Judge, 40 Barb. 193.

[9] Nolton v. Western R. R. Co., 15 N. Y. 444; 35 Barb. 389.

[10] Oldfield v. N. Y. and Harlem R. R. Co., 4 Kern. 310.

[11] The New World v. King, 16 How. (U. S.) 469, in which case the theory of the three degrees of negligence is examined. As to what constitutes negligence, see also Needham v. S. F. & S. J. R. R. Co., 37 Cal. 409; Schierhold v. N. B. & M. R. R. Co., 40 Id. 447; Karr v. Parks, 40 Id. 188; McCoy v. Cal. P. R. R. Co., 40 Id. 532.

tribute in any degree to the result.[1] The rule that, where the injury has been caused by the negligence of the party injured, he has no redress, has been commented on and qualified in California;[2] where it is also held that the negligence which disables a plaintiff from recovering must be a negligence which directly or by natural consequence conduces to the injury. It must have been the proximate cause, that is, negligence at the time the injury happened.[1]

It is not necessary to allege in the complaint in an action for damages to either person or property that the plaintiff is without fault,[4] as it may fairly be presumed that the plaintiff exercised usual care for his own safety.[5] The right to recover damages for injuries to the person depends upon two concurring facts: 1. The party claimed to have done the injury must be chargeable with some degree of negligence, if a natural person; if a corporation, with some degree of negligence on the part of its servants or agents; 2. The party injured must have been entirely free from any degree of negligence which contributed proximately to the injury.[6] Where negligence consists in the omission of a duty, the facts relied on as implying that duty must be alleged.[7] The allegation that the injury continued to be done from time to time, from the date of the wrongful act until the commencement of the suit, claiming special damages as a matter of aggravation, need not state the time or times when the damages were sustained, as the legal effect of the allegation is that they were sustained when the wrongful act was committed, and on divers days between that time and the commencement of the suit.[8]

§ 328. **Judgments, how Pleaded.** — In pleading a judgment, and especially of a court of general jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made, and if controverted, the facts conferring jurisdiction must be estab-

[1] Wilds v. H. Riv. R. R. Co., 24 N. Y. 430; 24 How. Pr. 97; Gorusch v. Cree, 8 Com. Bench (N. S.). 572, 598; Delafield v. Union Ferry Co., 10 Bosw. 216.

[2] Richmond v. Sacramento Val. R. R. Co., 18 Cal. 351.

[3] Kline v. C. P. R. R. Co., 37 Cal. 400; Needham v. S. F. & S. J. R. R. Co., 37 Id. 409; Flynn v. Same, 40 Id. 14; Maumus v. Champion, Id. 121; Hearne v. S. P. R. R. Co., 50 Id. 482.

[4] Wolfe v. Supervisors of Richmond, 11 Abb. Pr. 270; 19 How. Pr. 370.

[5] Johnson v. Hudson River R. R. Co., 20 N. Y. 65.

[6] See cases cited above.

[7] City of Buffalo v. Holloway, 7 N. Y. 493; Taylor v. Atlantic Mutual Ins. Co., 2 Bosw. 10; Congreve v. Morgan, 4 Duer, 439; Seymour v. Maddox, 16 Q. B. 326; S. C., 71 Eng. Com. L. R. 326; and see McGinity v. Mayor, etc., 5 Duer. 674; Gregory v. Oaksmith, 12 How. Pr. 134.

[8] McConnel v. Kibbe, 33 Ill. 175.

lished on the trial[1] In California, under the section cited below, this rule applies to all judgments or other determinations of a court, officer, or board. It was formerly held that in pleading the judgment of a court of limited jurisdiction, it is necessary to set forth the facts which give jurisdiction.[2] as the law presumes nothing in favor of their jurisdiction.[3] The decisions in New York seem to bear the other way on this point, and would appear to conform more nearly to the language of the statute than the early California decisions. There, it seems, it is no longer necessary to state the facts conferring jurisdiction on a court or officer of limited jurisdiction.[4] If it be denied, jurisdiction and all jurisdictional facts must be proved.[5] So held in pleading an insolvent discharge.[6]

In pleading a judgment, the precise words of the record need not be observed, and surplusage or immaterial omissions in matters of substance, in such pleas, are attended with no other consequences than in other cases. But in matters of description, the record produced must conform strictly to the plea.[7]

But this section does not refer to foreign judgments, and a general averment of jurisdiction of a foreign tribunal is not sufficient;[8] and therefore facts showing jurisdiction, both of person and subject-matter, must be stated.[9] But in California, where the transcript of the judgment shows the jurisdiction of the court on its face, it is not necessary to aver jurisdiction.[10] A judgment of the probate court may be pleaded in the mode prescribed by the statute.[11]

§ 329. **Statutes, how Pleaded.**—*Pleading a statute* is merely stating the facts which bring a case within it, without making mention or taking any notice of the statute itself. *Counting upon a statute* consists in making *express reference* to it, as by the words, "against the form of the statute," or "by

[1] California Code Civ. Proc., sec. 456; N. Y. Code, sec. 161; Nevada Code, sec. 59; Idaho, sec. 59; Arizona, sec. 59; Oregon, sec. 85; Low v. Burrows, 12 Cal. 181; Hanscom v. Tower, 17 Id. 518; Hunt v. Dutcher, 13 How. Pr. 538.

[2] Smith v. Andrews, 9 Cal. 652.

[3] Swain v. Chase, 12 Cal. 283; Rowley v. Howard, 23 Id. 403; McDonald v. Katz, 31 Id. 169. But see Cal. Code Civ. Proc., sec. 456.

[4] Wheeler v. Dakin, 12 How. Pr. 542.

[5] Id.

[6] Livingston v. Oaksmith, 13 Abb. Pr. 133; Carter v. Koezley, 14 Id. 147; *per contra*, McDonald v. Katz, 31 Cal. 169.

[7] Whitaker v. Bramson, 2 Paine, 209; compare Riddle v. Potter, 1 Cranch C. Ct. 288.

[8] Hollister v. Hollister, 10 How. Pr. 539; citing Barnes v. Harris, 3 Barb. 603; Ayres v. Covill, 18 Id. 260; Bemet v. Wisner, 1 N. Y. Code R. (N. S.) 143.

[9] McLaughlin v. Nichols, 13 Abb. Pr. 244; but in Halsted v. Black, 17 Abb. 227, the contrary is held.

[10] Low v. Burrows, 12 Cal. 181.

[11] Beans v. Emanuelli, 36 Cal. 117.

force of the statute in such case made and provided." *Reciting a statute* is quoting or stating its contents, and either form may be adopted by the pleader.[1] In pleading a private statute, or right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, for the court to take judicial notice thereof.[2] An averment that the statute *was passed* is sufficient.[3]

In pleading an act of the legislature, the title, being no part of an act, need not be recited;[4] but where a party refers to an act merely by the title, he thereby makes the title material, and must recite it correctly.[5] But when a pleader wishes to avail himself of a statutory privilege or right given by particular facts, he must show the facts; and those facts which the statute requires as the foundation of the action must be stated in the complaint.[6] It is safest to adopt and follow the very words of the law;[7] as the court takes judicial notice of the law, though the statute may be referred to in some cases to avoid ambiguity and create a certainty as to the relief demanded, as where the plaintiff has his election to sue for a penalty given by a statute, or to bring his action simply for the debt.[8]

With reference to acts regulated by the provisions of a statute, as of the statute of frauds, it is sufficient to use such certainty of allegation as was sufficient before the statute. So, on a promise to answer for the debt or default of another, it is not necessary in the complaint to aver that the promise was in writing;[9] or in an action on a contract relating to real estate.[10]

If a statute should contain exceptions in the enacting clause, the plaintiff must clearly show that the defendant is not within

[1] Gould's Pl. 46, note.

[2] Cal. Code C. P., sec. 459; N. Y. Code, sec. 530; Idaho, sec. 61; Nevada, sec. 61; Arizona, sec. 61; Oregon, sec. 87; 1 Van Santv. 270; 5 Sand. 153.

[3] Wolfe v. Superv. of Richmond, 11 Abb. Pr. 270.

[4] Eckert v. Head, 1 Mo. 593.

[5] Id.

[6] Dye v. Dye, 11 Cal. 163; but see Gimmy v. Doane, 22 Id. 638, where the application of the rule laid down in Dye v. Dye is doubted. In Himmelman v. Danos, 35 Id. 448, the distinction is drawn between pleading the performance of conditions precedent under a contract and conditions prescribed by a statute, holding that the latter must be alleged specially. See also Yertore v. Wiswall, 16 How. Pr. 8; Brown v. Harmon, 21 Barb. 508; Drowne v. Stimpson, 2 Mass. 444; Soper v. Harvard College, 1 Pick. 178; Austin v. Goodrich, 49 N. Y. 266.

[7] Ford v. Babcock, 2 Sandf. 523; Thomas v. People, 19 Wend. 480; Cole v. Jessup, 10 How. Pr. 515; overruling Fowler v. Hunt, 10 Johns. 464.

[8] City of Utica v. Richardson, 6 Hill, 300.

[9] Wakefield v. Greenhood, 29 Cal. 597; Stern v. Drinker, 2 E. D. Smith, 406; Hilliard v. Austin, 17 Barb. 141; Etling v. Vanderlyn, 4 Johns. 237.

[10] Livingston v. Smith, 14 How. Pr. 492; Reynolds v. Dunkirk R. R. Co., 17 Barb. 617; Champlin v. Parish, 11 Paige, 408.

the exception;[1] unless it be matter of defense, in which case the burden of proof being on the defendant the plaintiff need not allege it in the complaint, as the plaintiff need not allege anything in anticipation.[2] Numerous violations of the same subdivision of a section of a statute may be alleged in one count;[3] but separate counts must be used for violations of separate subdivisions.[4]

In penal actions founded on statutes, facts constituting the offense must be set out, and it must be stated as a substantive allegation that the offense was committed against the form of the statute.[5] As a general rule, a *scienter* need not be averred.[6] In remedial actions founded on statutes, such averments must be made as are necessary to bring the case within the statute,[7] as remedies in derogation of the common law must be strictly pursued.[8]

§ 330. **Foreign Statutes, how Pleaded.**—Where the plaintiff relies on the statute laws of another State, he must aver those laws in his pleadings in the same manner as other facts.[9] Thus, to plead that a contract is void by foreign usury laws, the laws should be stated; and the facts which render the contract void according to them should be alleged.[10] And the same rule applies to municipal laws and ordinances.[11] To show due diligence in suing on a foreign debt, the laws of such state regulating the contracts must be averred.[12] Pleading foreign statutes by their titles and dates, or statement of their general provisions and requirements, is insufficient.[13] But in the courts

[1] 1 T. R. 144; 6 Id. 559; 1 East, 646; 2 Chit. 522; Bennett v Hurd, 3 Johns. 438; Teel v. Fonda, 4 Ill. 304; Hart v. Cleis, 8 Id. 41; Sheldon v. Clark, 1 Id. 513; Burr v. Van Buskirk, 3 Cow. 263; Foster v. Hazen, 12 Barb. 547; First Baptist Church v. Utica & Schenectady R. R. Co., 6 Id. 313; Williams v. Ins. Co. of North America, 9 How. Pr. 365.

[2] Canfield v. Tobias, 21 Cal. 349; Radcliffe v. Rowley, 2 Barb. Ch. 23.

[3] Longworthy v. Knapp, 4 Abb. Pr. 115; People v. McFadden, 13 Wend. 396; Gaffney v. Colvill, 6 Hill, 567.

[4] See cases cited in last note.

[5] Levy v. Gowdey, 2 Allen, 321; Peabody v. Hayt, 10 Mass. 36; Nichols v. Squire, 5 Pick. 168; Haskell v. Moody, 9 Id. 162; Reed v. Northfield, 13 Id. 99.

[6] Bayard v. Smith, 17 Wend. 88; Gaffney v. Colvill, 6 Hill, 567.

[7] Reed v. Northfield, 13 Pick. 94; Worster v. Canal Bridge, 16 Id. 541; Read v. Chelmsford, Id. 128; Mitchell v. Clapp, 12 Cush. 278.

[8] Steel v. Steel, 1 Nev. 27.

[9] Throop v. Hatch, 3 Abb. Pr. 25; Phinney v. Phinney, 17 How Pr. 197; Thatcher v. Morris, 11 N. Y. 437; Monroe v. Douglass, 1 Seld. 447; Hutchison v. Patrick, 3 Mo. 65; Ruse v. Mutual Benefit Ins. Co., 23 N. Y. 516; Bean v. Briggs, 4 Iowa, 464; Walker v. Maxwell, 1 Mass. 104; and see Andrews v. Herriott, 4 Cow. 510, note.

[10] Curtis v. Masten, 11 Paige, 15.

[11] Harker v. Mayor of N. Y., 17 Wend. 199; People v. Mayor of N. Y., 7 How. Pr. 81.

[12] Mendenhall v. Gately, 18 Ind. 149.

[13] Throop v. Hatch, 3 Abb Pr. 23; Phinney v. Phinney, 17 How. Pr. 197; Carey v. Cincinnati etc. R. R. Co., 5 Clarke (Iowa), 357.

of the United States, no averment need be made in pleading, in respect to the laws of the several states, which would not be necessary within the respective states.[1]

§ 331. **Statutes of Limitations, how Pleaded.**—Facts taking the case out of the statute of limitations must be specially set out in the complaint.[2] A failure to plead it is a waiver of the same.[3] For if it appear on the face of the complaint that the claim is barred, and no facts are alleged taking the demand from the operation of the statute, the complaint is defective, and demurrer lies.[4] So, if fraud be alleged as committed more than three years before the commencement of the action, that period being the limitation prescribed by our statute, the plaintiff must allege discovery at a period bringing him within the exception. It is not, however, in general, necessary for plaintiff to allege in his complaint any facts or circumstances to avoid or anticipate the defense of the statute of limitations, unless the cause of action appear, upon the face of the complaint, to be barred. Where triple damages are given by a statute, it must be expressly inserted in the complaint, which must either recite the statute or conclude to the damage of the plaintiff against the form of the statute; as in actions for waste.[5] Where there are separate statutes, giving a different measure of damages for the same wrongs, it has been held that the plaintiff must elect upon which he will rely.[6]

§ 332. **Third Subdivision—Demand for Relief.**—The third subdivision of section 426 of the California code of civil procedure prescribes that the complaint shall contain a demand for the relief which the plaintiff claims. This is the most important subdivision of the section, as the relief granted to the plaintiff, if there be no answer, shall not exceed that demanded in the complaint.[7] But in any other case than a default of the defendant, as where issue is joined, the court may grant any re-

[1] Pennington v. Gibson, 16 How. U. S. 65.

[2] Wormouth v. Hatch, 33 Cal. 121.

[3] People v. Broadway Wharf Co., 31 Cal. 33.

[4] Smith v. Richmond, 19 Cal. 476; Chabot v. Tucker, 39 Id. 434.

[5] Chipman v. Emeric, 5 Cal. 239; see also Rees v. Emerick, 6 Serg. & R. 288; Newcomb v. Butterfield, 8 Johns. 342; Livingston v. Platner, 1 Cow. 176; Benton v. Dale, Id. 160.

[6] Sipperly v. Troy and Boston R. R. Co., 9 How. Pr. 83.

[7] California Code Civil Proc., sec. 580; N. Y. Code, sec. 275; and codes of Nevada, Idaho, Arizona, etc.; Raun v. Reynolds, 11 Cal. 19; Gage v. Rogers, 20 Id. 91; Lattimer v. Ryan, Id. 628; Lamping v. Hyatt, 27 Id. 102; Gautier v. English, 29 Id. 165; Parrott v. Den, 34 Id. 81; Simonson v. Blake, 12 Abb. Pr. 331; 20 How. Pr. 484; Walton v. Walton, 32 Barb. 203; Bond v. Pacheco, 30 Cal. 531, where it is held that a judgment rendered for a sum greater than that demanded in the prayer is not void, but erroneous. See also Andrews v. Monilaws, 8 Hun, 65.

lief consistent with the case made by the complaint and embraced within the issue;[1] so that where there is an answer to the complaint, the prayer for relief becomes immaterial.[2] So held in *mandamus* and *quo warranto*.[3]

The theory of the code seems to require the plaintiff specifically to demand the relief to which he supposes himself entitled.[4] But where a party asks for a specific relief, or for such other or further order as may be just, the court may afford any relief compatible with the facts of the case presented.[5] And if specific relief can not be granted, such relief as the case authorizes may be had under the prayer for general relief.[6] Thus, under the general prayer, the court may allow a deed to be reformed by inserting in it a power of revocation.[7] It is, however, improper to include counsel fees and amount paid for taxes in the judgment, if not asked for in the prayer for relief.[8] To entitle plaintiff to relief in equity, it must be shown that he is without remedy at law.[9]

The prayer of a complaint may seek both legal and equitable relief where the matter arises out of the same transaction.[10] But they must be separately stated in the complaint.[11] And the grounds of equitable interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought.[12] Thus a prayer for an injunction is proper in an action of trespass.[13] Or where suit is brought to test the prior-

[1] California Code Civil Proc., sec. 580; Savings and Loan Society v. Thompson, 32 Cal. 347.

[2] See cases last cited; Marquat v. Marquat, 2 Kern. 336.

[3] People v. Board of Supervisors, 27 Cal. 655.

[4] L'Amoreaux v Atlantic Mut. Ins. Co., 3 Duer, 640; Mills v. Thursby, 2 Abb. Pr. 432. The effect of the prayer of the complaint is discussed and qualified in Savings and Loan Society v. Thompson, 32 Cal. 347; Conger v. Gilmer, 34 Id. 77; Lane v. Gluckauff, 28 Id. 239; Cassacia v. Phœnix Ins. Co., 28 Id. 628; McComb v. Reed, Id. 289; N. C. & S. C. Co. v. Kidd, 37 Id. 301; Van Dyke v. Jackson, 1 E. D. Smith, 419; Jones v. Butler, 30 Barb 641; 20 How. Pr. 189; Emery v. Pease, 20 N. Y. 62; Marquat v. Marquat, 12 Id. 336; reversing S. C., 7 How. Pr. 417.

[5] People v. Turner, 1 Cal. 152.

[6] Id.; Truebody, v. Jacobson, 2 Id. 269; Rollins v. Forbes, 10 Id. 299; Henson v. Decker, 29 How. Pr. 385; see Dykers v. Townsend, 24 N. Y. 62.

[7] Grafton v. Remsen, 16 How. Pr. 32.

[8] Janson v. Smith, Cal. Sup. Ct., Jan. T. 1865, not reported.

[9] Lupton v. Lupton, 3 Cal. 120; Parker v. Woolen Co., 2 Black. U. S. 545. What averments on the face of a bill in equity entitle plaintiff to relief, see Griffing v. Gibb, 2 Black U. S. 519.

[10] Gates v. Kieff, 7 Cal. 125; Marius v. Bicknell, 10 Id. 224; Weaver v. Conger, Id. 237; Rollins v. Forbes, Id. 300; Hill v. Taylor, 22 Id. 191; Eastman v. Turman, 24 Id. 382; Gray v. Dougherty, 25 Id. 266; More v. Massini, 32 Id. 595, 596; Palen v. Bushnell, 46 Barb. 24.

[11] Gates v. Kieff, 7 Cal. 124; Getty v. Hudson River R. R. Co., 6 How. Pr. 269; New York Ice Co. v. N. W. Ins. Co., 23 N. Y. 357; 21 How. Pr. 296; Lamport v. Abbott, 12 Id. 340.

[12] Natoma Water and Mining Co. v. Clarkin, 14 Cal. 544.

[13] Gates v. Kieff, 7 Cal. 125.

ity of the appropriation of water.[1] Or on foreclosure of a mortgage to restrain waste during the period of redemption.[2] But a prayer can not include a demand for two kinds of relief inconsistent with each other, as for redelivery of and damages for the detention and conversion of personal property.[3] Or for general relief and for judgment in a specified sum for a money demand on a contract.[4] But such prayer will not be struck out.[5] And the court will not resort to rules of construction to determine the species of relief demanded.[6] But, although the prayer be inartificially framed, the court will grant relief.[7] Under the liberal rules of our code the complaint must be taken as a whole, and mere failure to make the prayer conform to the causes of action set forth in the complaint, will not preclude the plaintiff from obtaining the relief which the complaint seeks, but which the prayer omits. A party can not state one set of facts in his complaint, pray for the relief which those facts would authorize, and get judgment upon another set of facts.

In general, a demand for judgment in the alternative is improper.[8] But in actions for equitable relief, the complaint may be framed with a double aspect where there is doubt as to the particular relief to which the plaintiff is entitled.[9]

There is no rule of pleading which requires a party to aver the precise amount he claims; but he may recover a less amount than that which is stated in the complaint.[10] And where there are two independent counts in the complaint, each complete within itself, and concluding with a prayer for relief, and a verdict for the plaintiff on one count only, the relief will follow the prayer of that count.[11]

[1] Marius v. Bicknell, 10 Cal. 217.
[2] Hill v. Taylor, 22 Cal. 191.
[3] Maxwell v. Farnam, 7 How. Pr. 236.
[4] Durant v. Gardner, 10 Abb. Pr. 445.
[5] Hemson v. Decker, 29 How. Pr. 385.
[6] Gates v. Kieff, 7 Cal. 125.
[7] People v. Turner, 1 Cal. 152; Truebody v. Jacobson, 2 Id. 269; Stewart v. Hutchinson, 29 How. Pr. 181.
[8] Maxwell v. Farnam, 7 How. Pr. 236; Durant v. Gardner, 10 Abb. Pr. 445; 19 How. Pr. 94.
[9] Young v. Edwards, 11 How. Pr. 201; Warwick v. Mayor of N. Y., 28 Barb. 210; 7 Abb. Pr. 265; People v. Mayor of N. Y., 28 Barb. 240; 8 Abb. Pr. 7; Wood v. Seely, 32 N. Y. 105.
[10] Meek v. McClure, 49 Cal. 627.
[11] N. C. & S. C. Co. v. Kidd, 37 Cal. 283.

FORMS OF COMPLAINTS.

SUBDIVISION FIRST.

BY AND AGAINST PARTICULAR PERSONS, INDIVIDUALLY, AND IN REPRESENTATIVE CHARACTER AND OFFICIAL CAPACITY.

CHAPTER I.

ASSIGNEES AND DEVISEES.

§ 333. By the Assignee of a Claim.

Form No. 70.

[TITLE.]

The plaintiff complains, and alleges:

I. [State cause of action accruing to the plaintiff's assignor.]

II. That on the ..... day of ....., 18 . ., at ....., the said ..... assigned the said claim to plaintiff.

[DEMAND OF JUDGMENT.

§ 334. What Choses in Action are Assignable.—The provisions of the codes of the various states requiring that "every action must be prosecuted in the name of the real party in interest,"[1] except as otherwise provided, the immediate effect of which is to permit the assignee of a thing in action to sue in his own name, raises the important question, What things in action are assignable? At common law, with the exception of actions on negotiable paper, the rule was well set led that "in general, the action upon a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the legal interest in such

[1] California, sec. 367; N. Y., sec. —; S. C., sec. 134; N. C., sec. 55; Indiana, sec 8; Kansas, sec. 26; Minn., sec. 26; Mo., art. 1, sec. 2; Wis., c. 122, sec. 12; Or., secs. 27, 379; Fla., sec. 62; Nev., sec. 4; Ky., sec. 30; Ohio, sec. 25; Iowa, sec. 2543; Neb., sec. 28; Col., sec. —; Wyoming, sec. 31; Idaho, sec. 4; Ariz., sec. —; Mon., sec. 4.

contract was vested."[1] In equity a different rule prevailed, which permitted the assignee to sue in his own name. The effect of the provisions of the code cited above is to extend this equity doctrine to all cases of assignment, but not to render assignable any claims or demands which before its enactment were unassignable.[2] In the determination of this question, therefore recourse must be had to the settled doctrines of the law as they existed, independent of any changes of procedure made by the code. As a general proposition, all choses in action which survive and pass to the personal representatives of a decedent are assignable, and this includes not only causes of action which arise from contract, but in many cases those which have their origin in torts done to personal or real property. In general all causes of action arising from the breach of contract survive, and are consequently assignable, except those which are purely personal in their nature, and the fulfillment of which requires the continuance of the relation between the original contracting parties. As illustrations of such personal contracts which are not subject to assignment, are contracts providing for apprenticeship,[3] contracts for marriage,[4] and contracts stipulating for the performance of services by an attorney or medical practitioner.[5] On the contrary the following causes

[1] 1 Ch. Pl. 2.

[2] Hodgman v. Western R. Co., 7 How. Pr. 492, in which the court said: "The only change made by the code is to transfer with the beneficial interest the right of action also in those cases where before the court would recognize and protect the rights of the assignee. No new right of action is created; no authority is given to assign a right of action not before assignable."

[3] Hall v. Gardner, 1 Mass. 172; Davis v. Coburn, 8 Id. 299; Cochran's Ex'r v. Davis, 5 Litt. 118.

[4] Stebbins v. Palmer, 1 Pick. 71; Smith v. Sherman, 4 Cush. 408; Latimore v. Simmons, 13 Serg. & R. 183; Chamberlain v. Williamson, 2 Mau. & Sel. 408; 1 Ch. Pl. 51; Meech v. Stoner, 19 N. Y. 29; Wade v. Kalbfleisch, 58 Id. 282.

[5] Zabriskie v. Smith, 13 N. Y. 333. In this case Denio, J., said: "The maxim of the common law is, *Actio personalis moritur cum persona*. This principle was not originally applied to causes of action growing out of the breach of a contract. They were parcel of the personal estate, in reference to which the administrator or executor represents the person of the deceased, and is in law his assignee. But as to this class of rights of action late cases have somewhat qualified the rule, and it is now well settled that an executor or administrator can not maintain an action upon an express or implied promise to the deceased, where the damages consist entirely of the personal sufferings of the deceased, whether mental or corporeal. Actions for the breach of a promise of marriage, for unskillfulness of medical practitioners contrary to their implied undertaking, the imprisonment of a party on account of the neglect of his attorney to perform his professional engagements, fall under this head, being considered as virtually actions for injuries to the person. * * * If it be true that the executors and administrators are the testator's assignees, it is fair to assume that they take whatever of a personal nature the deceased had which was capable of assignment; and thus the power to assign and to transmit to the personal representatives are convertible propositions. * * * Any

of action have been held assignable, although upon a casual examination they might appear to fall within the class of personal contracts which are not subject to transfer. Thus a contract of guaranty;[1] the right of a borrower to recover back the excessive interest upon an usurious loan;[2] a contract for the hiring of the services of state prison convicts;[3] a contract with the authorities of a city corporation for cleaning the streets during a certain time and at a stipulated price;[4] right of an officer to his fees,[5] and the right of a widow to her dower before admeasurement, may all be assigned.[6]

§ 335. **Assignment of Claims Arising from Torts.**—In determining what causes of action arising from torts are assignable, the same criterion has been adopted as in the case of contracts. If the claim is one which would survive to the personal representative of the decedent, it is assignable, otherwise not. As a general rule causes of action arising from torts were not assignable at common law; and the same rule prevailed in equity as to merely personal injuries, such as libel, slander, and the like, where the effect of the injury did not tend to diminish the value of the estate. Such personal injuries died with the person, and were incapable of assignment.[7] Statutes have been passed in most of the states which increase the number of causes of action which survive, so as to include all injuries to property by which its value has been diminished.[8] As illustrations of such causes of action which survive, and are consequently assignable, may be mentioned claims arising from the negligent use of real or personal property.[9] Or for the conversion of the

interest to which the personal representatives of a decedent would not succeed is not the subject of assignment *inter vivos*."

[1] Small v. Sloan, 1 Bosw. 352.

[2] Wheelock v. Lee, 64 N. Y. 242.

[3] Horner v. Wood, 23 N. Y. 350.

[4] Devlin v. Mayor, 63 N. Y. 8. In discussing the right of a contractor to assign, Allen, J., said: "If the service to be rendered is not necessarily personal, and such as can only, and with due regard to the interests of the parties and the rights of the adverse party, be rendered by the original contractor, and the latter has not disqualified himself from performance," the contract is assignable.

[5] Platt v. Stout, 14 Abb. Pr. 178; Birkbeck v. Stafford, Id. 285.

[6] Strong v. Clem, 12 Ind. 37.

[7] People v. Tioga, 19 Wend. 73; Comegys v. Vane, 1 Pet. 209.

[8] Hoyt v. Thompson, 5 N. Y. 320; Haight v. Hayt, 19 Id. 464; Byxbie v. Wood, 24 Id. 607; McMahon v. Allen, 35 Id. 403; Graves v. Spiers, 58 Barb. 349; Butler v. N. Y. & E. R. R., 22 Id. 110; Weire v. Davenport, 11 Iowa, 49; Tyson v. McGuineas, 25 Wis. 656; Smith v. Harris, 48 Mo. 562.

[9] Fried v. N. Y. Cent. R. R., 25 How. Pr. 285; Waldron v. Willard, 17 N. Y. 466; Merrill v. Grinnell, 30 Id. 594; Merrick v. Brainard, 38 Barb. 574; Stanton v. Leland, 4 E. D. Smith, 88; Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648; Dininny v. Fay, 38 Barb. 18; Ayrault v. Pacific Bank, 6 Robt. 337.

latter.[1] Or injuries to the same.[2] Or for fraudulently inducing one to enter into the marriage relation.[3] Or for fraud or deceit in contracts relating to the sale of real or personal property.[4] On the contrary, causes of action which relate purely to the person, and are founded on injuries done to the body or character, do not survive, and, as a consequence, are not assignable. As illustrations of this class are claims for malicious prosecution.[5] Or for injuries to the person, caused by the neglect of a common carrier.[6] Or for a vendor's lien for the purchase price of land sold.[7] Nor will a verdict rendered in such an action change the nature of the demand so as to render it assignable, although after judgment the same may be assigned as a contract of record.[8] If, however, after judgment has been entered upon the verdict, and a motion for a new trial has been made, the party in the mean time die, judgment will be entered *nunc pro tunc* as of the time of the verdict, so as to prevent the action from abating.[9]

§ 336. **Assignments, how Made.**—No formality in the manner of assignment is necessary to invest the assignee with the right to bring suit in his own name. Any act amounting to a rightful appropriation of a debt, or whereby one person's interest in a chose in action passes to another, constitutes an assignment.[10] So, where an order is given for a valuable consideration, and for the whole amount of a demand against the drawee, though worthless as a bill, it operates as an assignment of the debt or fund against which it is drawn.[11] And an order

[1] Lazard v. Wheeler, 22 Cal. 139; Tyson v. McGuineas, 25 Wis. 656; Smith v. Kennett, 18 Mo. 154; McKee v. Judd, 12 N. Y. 622; Richtmeyer v. Remsen, 38 Id. 206.

[2] Rutherford v. Aiken, 8 N. Y. Sup. Ct 60; More v. Massini, 32 Cal. 590; Haight v. Green, 19 Id. 113; Weire v. Davenport, 11 Iowa, 49; McArthur v Green Bay etc. Co., 34 Wis. 139; Butler v. N. Y. & E. R. R., 22 Barb. 110.

[3] Higgins v. Breen, 9 Mo. 497.

[4] Haight v. Havt, 19 N. Y. 464; Byxbie v. Wood, 24 N. Y. 607; Graves v. Spier, 58 Barb. 349; Johnston v. Bennett, 5 Abb. Pr. (N. S.) 331; Woodbury v. Deloss, 65 Barb. 501; Grocers' Nat. Bk. v. Clark, 48 Id. 26; but see *contra*, Zabriskie v. Smith, 13 N. Y. 322.

[5] Noonan v. Orton, 34 Wis. 259; Lawrence v. Martin, 22 Cal. 173.

[6] Hodgman v. Western R. R., 7 How. Pr. 492; Purple v. H. R. R. R., 4 Duer, 74. This rule has been changed in several of the states by special statutes, which give a right of action under such circumstances to the personal representatives of the deceased

[7] Baum v. Grisby, 21 Cal. 172; Lewis v. Covilland, Id. 78; Williams v. Young, Id. 227.

[8] Lawrence v. Martin, 22 Cal. 173; Crouch v. Gridley, 6 Hill, 250; In re Charles, 14 East, 197; Kellogg v. Schuyler, 2 Denio, 73.

[9] Ryghtmyre v. Durham, 12 Wend. 245; Turner v. Booker, 2 Dana, 334; Collins v. Prentice, 15 Conn. 423; Dial v. Holter, 6 Ohio St. 228.

[10] Wiggins v. McDonald, 18 Cal. 126.

[11] Wheatley v. Strobe, 12 Cal. 92; Walker v. Mauro, 18 Mo. 564.

drawn by a creditor on his debtor for a portion of his demand constitutes an assignment of the debt *pro tanto*.[1] In Kentucky, however, no title passes by a partial assignment.[2] While in Indiana (the code of which state requires that in an action by an assignee, founded on a non-negotiable instrument, the assignor shall be joined), the assignee of part of a judgment was united with the assignor;[3] and the same was permitted in the case of the assignee of one of two payees of a promissory note.[4] Upon the same principle, the assignment by a creditor to his debtor of part of his demand constitutes a payment thereof *pro tanto*.[5] So also the indorsement of a bill of lading, *prima facie*, vests the property in the goods in the indorsee.[6] An instrument in writing, whether the same be a contract, bond, or judgment, may be assigned by a writing on a separate piece of paper, or even by parol;[7] and an instrument under seal may be transferred by a writing not sealed.[8] The mere signing an assignment, without delivery, is sufficient to constitute the assignee the real party in interest, so as to authorize him to sue in his own name.[9] A negotiable promissory note or bill of exchange must be assigned by indorsement, in order to preserve its negotiability; but an assignee by delivery may sue thereon in his own name, subject to all the equities existing in favor of the drawer.[10]

§ 337. **Assignments, how Alleged.**—Where the plaintiff is an assignee, the complaint must allege the fact of the assignment.[11] Such allegations must be a positive averment of a transfer, so as to show title in the plaintiff.[12] It is not enough merely to allege that "the said plaintiff is now the sole owner of the

[1] McEwen v. Johnson, 7 Cal 258; Grain v. Aldrich, 38 Id. 514.

[2] Elledge v. Straughn, 2 B. Mon. 82; Bank of Galliopolis v. Trimble, 6 Id. 599.

[3] Tapping v. Duffy, 47 Ind. 57.

[4] Groves v. Ruby, 24 Ind. 418.

[5] McPike v. McPherson, 41 Mo. 521.

[6] Lineker v. Aveshford, 1 Cal. 76; Harris v De Wolf, 4 Pet. 147; Balderston v. Munro, 2 Cranch C. C. 623.

[7] Hooker v. Eagle Bank, 30 N. Y. 83; Jones v. Witter, 13 Mass. 304; Briggs v. Dorr, 19 Johns. 95; Dunn v. Snell, 15 Id. 481; McClain v. Weidemeyer, 25 Mo. 354; Thornton v. Crowther, 24 Id. 164; Hancock v. Ritchie, 11 Ind. 48; Andrews v McDaniel, 68 N. C. 385; White v. Phelps, 14 Minn. 27; Weinwick v. Bender, 33 Mo. 80; Pearson v. Cummings, 28 Iowa, 344; Williams v. Norton, 3 Kan. 295; Carpenter v. Miles, 17 B. Mon. 598; Conyngham v. Smith, 16 Iowa, 471; Barthol v. Blakin, 31 Id. 452; Moore v. Lowry, 25 Id. 336; Green v. Marble, 37 Id. 95.

[8] Moore v. Waddle, 34 Cal 145.

[9] Ritter v. Stevenson, 7 Cal. 388.

[10] Andrews v. McDaniel, 68 N. C. 385; Mandeville v. Riddle, 1 Cranch, 95; White v. Brown, 14 How. Pr. 282; Billings v. Jane, 11 Barb. 620; Gould v. Ellery, 39 Id. 163; Farrington v. Park Bank, Id. 645; Brown v. Richardson, 1 Bosw. 402; Houghton v. Dodge, 5 Id. 326; Sexton v. Fleet, 2 Hilt. 485.

[11] Prindle v. Caruthers, 15 N. Y. 426; White v. Brown, 14 How. Pr. 282; Adams v. Holley, 12 Id. 330.

[12] Stearns v. Martin, 4 Cal. 227.

demand." Such an allegation is not an averment of an issuable fact, but of a mere conclusion of law, and its denial would raise no issue.[1] An allegation that A. duly assigned and transferred all his interest in the contract to the plaintiff B., and that the plaintiff C. became interested by a sale and assignment to him of a part of B.'s interest, has been held sufficient.[2] In Indiana, where an instrument not assignable is assigned and sued on by the assignee, if the assignor is made a party, it is immaterial and need not be alleged how the assignment was made.[3]

§ 338. **Averment of Consideration for Assignment.**—A promissory note imports a consideration, and none need be pleaded in an action by an assignee.[4] Even for a sealed contract an averment of assignment imports that it was made by a sealed instrument, from which a consideration is to be inferred, and consequently none need be stated.[5] Nor can the defendant aver or prove that the assignment was only intended as collateral security for the payment of a debt, if the assignment is absolute on its face.[6] So, in Kentucky, it is not necessary in a suit by an assignee of a chose in action, against the assignor, to aver a valuable consideration. It is sufficient to set out the assignment.[7]

§ 339. **Assignment of Accounts.**—The assignee may sue in his own name on an account assigned to him.[8] But where there is no final settlement of partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portions of this amount, no action can be maintained therefor in *assumpsit*, nor can an individual partner assign his claim against the partnership so that the assignee may sue.[9] The assignee of an account and note given in part payment of it, where the assignment of the

[1] Thomas v. Desmond, 12 How. Pr. 321; Russell v. Clapp, 7 Barb. 482; Bentley v. Jones, 4 How. Pr. 202; McMurray v. Gifford, 5 Id. 14; Parker v. Totten, 10 Id. 233; Poorman v. Mills, 35 Cal. 121. In Brown v. Richardson, 20 N. Y. 472, an averment in an action on a non-negotiable note that the same was duly indorsed to plaintiff, and that he is the lawful owner and holder of the same, was held sufficient to admit evidence of the assignment.

[2] Horner v. Wood, 15 Barb. 372; Fowler v. N. Y. Indem. Ins. Co., 23 Id. 151.

[3] Buntin v. Weddle, 20 Ind. 449.

[4] Winters v. Rush, 34 Cal. 136; Martin v. Kanouse, 2 Abb. Pr. 331; Horner v. Wood, 15 Barb 372.

[5] Moore v. Waddle, 34 Cal. 145; Fowler v. New York Indem. Ins. Co., 23 Barb. 148; Clark v. Downing, 1 E. D. Smith, 406; Burtnett v. Gwynne, 2 Ab. Pr. 79; Vogel v. Badcock, 1 Id. 176; Martin v. Kanouse, 2 Id. 330; Richardson v. Mead, 27 Barb. 178.

[6] Wetmore v. San Francisco, 44 Cal. 294.

[7] Holt v. Thompson, 1 Duval, 301.

[8] Carpenter v. Johnson, 1 Nev. 331.

[9] Bullard v. Kinney, 10 Cal. 63.

two claims was contemporaneous, may sue in his own name.[1] An assignment of an account by indorsing on it the word "Assigned," is sufficient, and it may be amended on the trial by writing above it, "For value received, I hereby assign the within account."[2]

§ 340. **Assignment of Bonds, Notes, etc.**—An assignee of bonds, notes, etc., may maintain an action thereon in his own name.[3] The assignment of a note to the maker is a payment of the same. And the same is true of a joint and several note, assigned to one of the makers.[4] Payment by the maker of a non-negotiable note of the sum due upon an attachment against the payee, without notice of an assignment, will bar a suit by the assignee.[5] Although a bill or note payable to order can only be made negotiable by an indorsement by the payee, still a transfer by delivery is sufficient to entitle the holder to sue thereon in his own name, the same as in assignments of other choses in action.[6]

§ 341. **Assignment by a Corporation.**—In an action brought by the assignee of a corporation, it is not essential to particularly state the fact of incorporation. A statement of the name of the corporation, and of the making of the agreement between them, and of what the corporation did in fulfillment of its agreement, is sufficient.[7] And the complaint need not aver that the directors were authorized to make it.[8]

§ 342. **Assignment of Debts.**—An order drawn by a creditor on his debtor is *prima facie* evidence of an assignment of the debt *pro tanto*, and the assignee may recover on the same.[9] And drawees with notice are liable to payees without an express promise to pay. In Maine, an assignment of a debt may be made by parol, or may be inferred from the acts of the parties.[10] And in New Hampshire also claims for torts as well as for property may be assigned by parol.[11] In Missouri, a general conveyance of all "debts that may be due," without a schedule, passes to the grantee such a title as will enable him to recover from a subsequent general assignee.[12]

[1] Armstrong v. Cushney, 43 Barb. 340.
[2] Ryan v. Maddux, 6 Cal. 247.
[3] Mandeville v. Riddle, 1 Cranch, 290; Cottle v. Cole, 20 Iowa, 481.
[4] Gordon v. Wansey, 21 Cal. 77.
[5] Weinwick v. Bender, 33 Mo. 80.
[6] Brown v. Richardson, 20 N. Y. 472; S. C., 1 Bosw. 402; Billings v. Jane, 11 Barb. 620; White v. Brown, 14 How. Pr. 282; Houghton v. Dodge, 5 Bosw. 326; Sexon v. Fleet, 2 Hilt. 485; Gould v. Ellery, 39 Barb. 163; Farrington v. Park Bank. Id. 645.
[7] Kennedy v. Cotton, 28 Barb. 59.
[8] Nelson v. Eaton, 16 Abb. Pr. 118.
[9] McEwen v. Johnson, 7 Cal. 258; Wheatley v. Strobe, 12 Id. 97; Pope v. Huth, 14 Id. 408.
[10] Garnsey v. Gardner, 49 Me. 167.
[11] Jordan v. Gillen, 44 N. H. 424.
[12] Page v. Gardner, 20 Mo. 507.

§ 343. **Assignment of Goods not in Possession.**— Where the vendor of goods is not at the time of sale in possession, the transfer is an assignment, and an actual and continued change of possession is required equally as in cases of sale by one in possession.[1] And where B., the vendee, assigned to C. a contract for the delivery of goods to arrive, and C., after the arrival of the goods, tendered payment for the same, it was held that A., the vendor, was not entitled to notice of the assignment, but that C. might enforce the contract against him.[2]

§ 344. **Assignment of Lease.** — An assignment of all right, title, and interest of the lessee conveys his right for compensation for new erections on the land under the covenants.[3] A lease, or an interest therein, or a right of entry for breach of one of its conditions, may be assigned, so as to entitle the assignee to sue in his own name.[4]

§ 345. **Assignment of Mortgages.** — A mortgage, independent of the debt it is intended to secure, has no assignable quality.[5] The assignment of the debt, note, or bond secured by the mortgage, even without a formal transfer of the security, carries the mortgage with it.[6] In California it has been held that the equitable lien which a vendor of real estate retains upon the property for the unpaid purchase money is not assignable.[7] But a claim for damages for trespass on land is assignable, and the assignee may maintain an action for the same in his own name.[8]

§ 346. **Assignment of Insurance Policy.**— An assignment of a policy of insurance on a stock of goods attaches, in equity, as a lien upon the amount due on the policy to the extent of the debt as soon as the loss occurs.[9]

§ 347. **Assignments of Judgments.** — A cause of action which does not survive to the personal representatives is not assignable. But if suit has been brought on such a cause of action, and judgment recovered, the judgment is considered as a contract, and is capable of assignment, even after the death of the judgment creditor. A verdict, however, on such a cause

[1] Weil v. Paul, 22 Cal. 492.
[2] Morgan v. Lowe, 5 Cal. 326.
[3] Hunt v. Danforth, 2 Curt. C. Ct. 592.
[4] Averill v. Taylor, 8 N. Y. 44; Van Rensselaer v. Ball, 12 N. Y. 100; Van Rensselaer v. Hays, Id. 68.
[5] Polhemus v. Trainer, 30 Cal. 685.
[6] Hatch v. White, 2 Gall. 152; Willis v. Farley, 24 Cal. 490; Hurt v. Wilson, 38 Id. 263.
[7] Baum v. Grigsby, 21 Cal. 172; Lewis v. Covillaud, Id. 178; Williams v. Young, Id. 227.
[8] More v. Massini, 32 Cal. 590.
[9] Bibend v. L. & L. F. & L. Ins. Co., 30 Cal. 78; Pope v. Huth, 14 Id. 403; Wheatley v. Strobe, 12 Id. 92.

of action does not have the same effect.[1] If a judgment creditor assign the judgment, and the judgment debtor without notice of the assignment afterwards pays the same voluntarily to the sheriff, by reason of service of garnishment process upon him, the assignee may still enforce the judgment.[2] In a suit to enforce a judgment lien on real estate brought by the assignees of the judgment, the judgment and the assignment must be set forth.[3]

§ 348. **Assignment of Corporate Stock.**—An assignment of shares of stock in a corporation under the California statute of 1853, by delivery of the certificates, without transfer on the books of the company, is invalid against subsequent purchasers on execution against the assignor, without notice of the assignment.[4]

§ 349. **Effect of Assignment.**—In addition to the provisions of the codes which require every action to be prosecuted in the name of the real party in interest—the effect of which, as has been seen above, is to permit the assignee to bring the action in his own name—there is another very important section which should be considered in this connection. The codes, with very little difference in the language, provide that "in the case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section shall not apply to negotiable promissory notes and bills of exchange, transferred in good faith and upon good consideration, before maturity."[5] This statutory provision is a substantial embodiment of the familiar rule which existed prior to the adoption of the codes, that the assignee of a thing in action, not negotiable, takes the same subject to all the defenses legal or equitable existing between the original parties.[6] Or, as the rule is stated by Johnson, J., "In the case of the assignment of a thing in action, the action of the assignee shall be

[1] Lawrence v. Martin, 22 Cal. 173.
[2] Brown v. Ayres, 33 Cal. 525.
[3] Brookshire v. Lomax, 20 Ind. 512.
[4] Weston v. Bear River etc. Co., 5 Cal. 186; Naglee v. Pacific Wharf Co., 20 Id. 529; People v. Elmore, 35 Id. 653; Parrott v. Byres, 40 Id. 614.
[5] Arizona, sec. 5; California, sec. 368; Colorado, sec. —; Dakota, sec. 65; Florida, sec. 63; Idaho, sec. 5; Indiana, sec. 6; Iowa, sec. 2546; Kansas, sec. 27; Kentucky, sec. 31; Montana, sec. 5; Minnesota, sec. 27; Nevada, sec. 5; New York, sec. —; North Carolina, sec. 55; Nebraska, sec. 29; Oregon, secs. 28, 382; South Carolina, sec. 135; Washington, sec. 3; Wisconsin, c. 122, sec. 13; Wyoming, sec. —.
[6] McCabe v. Gray, 20 Cal. 509; Northam v. Gordon, 23 Id. 255; Truebody v. Jacobson, 2 Id. 269; Olds v. Cummings, 31 Ill. 188; Fortier v. Darst, Id. 212; Shaw v. Shaw, 4 Cranch C. Ct. 715; Shirras v. Caig, 7 Cranch, 34; Kinsman v. Parkhurst, 18 How. 289; Timms v. Shannon, 19 Md. 296.

without prejudice to any set-off or other defense existing at the time of or before notice of the assignment, which would have been available to the defendant had the action been brought in the name of the assignor.[1] This doctrine has been applied to assignments of bonds under the statutes of Virginia and Indiana:[2] in actions by the assignees of mortgages;[3] in an action on a non-negotiable warehouseman's receipt;[4] in an action by the assignee of judgments and decrees;[5] in actions by the assignees for the benefit of creditors;[6] in actions by the assignee of negotiable paper after it has lost its negotiable character;[7] in actions by the assignee of the vendee, to compel the specific performance of a contract for the sale of lands;[8] and in actions by the assignee of a partner.[9]

When the assignee of a thing in action, which is subject to equities between the original parties, assigns it to a second assignee by a transfer which purports to convey a perfect title, for a good consideration, and without any notice on the part of the second assignee of any defect in the title, the question has often arisen, whether such second assignee is affected by the equities which existed between the original parties. These equities are often spoken of as latent, and several courts have adopted the rule that such latent equities can not prevail against the title of the second assignee.[10] The effect of this rule is to

[1] Beckwith v. Union Bank, 9 N. Y. 211; and see to the same effect, Myers v. Davis, 22 N. Y. 489; Ingraham v. Disborough, 47 Id. 421; Andrews v. Gillespie, Id. 487; Bush v. Lathrop 22 Id. 535; Reeves v. Kimball, 40 Id. 299; Wood v. Perry, 1 Barb. 114; Ainslie v. Boynton, 2 Id. 258; Commercial Bank v. Colt, 15 Id. 506; Western Bank v. Sherwood, 29 Id. 383; Blydenburgh v. Thayer, 3 Keyes, 293; In Callanan v. Edwards, 32 N. Y. 486, the rule is thus stated: "An assignee of a chose in action not negotiable takes the thing assigned, subject to all the rights which the debtor had acquired in respect thereto prior to the assignment, or to the time notice was given of it, when there is an interval between the execution of the transfer and the notice."

[2] Scott v. Shreve, 12 Wheat. 605; Bell v. Nimmo, 5 McLean, 110.

[3] Hubbard v. Turner, 2 McLean, 519; Western Bank v. Sherwood, 29 Barb. 383.

[4] Commercial Bank v. Colt, 15 Barb. 506.

[5] Sampeyreac v. United States, 7 Pet. 222.

[6] Marine Bank v. Jauncey, 1 Barb. 486: Maas v. Goodman, 2 Hilt. 275.

[7] Gwathney v. McLane, 3 McLean, 371; Rounsavel v. Scholfield, 2 Cranch C. Ct. 139.

[8] Reeves v. Kimball, 40 N. Y. 299.

[9] Nicoll v. Mumford, 4 Johns. Ch. 522; Rodriguez v. Heffernan, 5 Id. 417.

[10] Livingston v. Dean, 2 Johns. Ch. 479; Murray v. Lylburn, 2 Id. 441; Rodriguez v. Heffernan, 5 Id. 417; Murray v. Ballou, 1 Id. 566; Bebee v. Bank of N. Y., 1 Johns. 529; James v. Morey, 2 Cow. 246; Losey v. Simpson, 8 Stockt. Ch. 246; Bloomer v. Henderson, 8 Mich. 395; Croft v. Bunster, 9 Wis. 503; Mott v. Clark, 9 Pa. St. 399; Taylor v. Gitt, 10 Id. 428; Metzgar v. Metzgar, 1 Rawle, 227; McConnell v. Wenrich, 16 Pa. St. 365; Moore v. Holcombe, 3 Leigh, 648; Ohio L. Ins. Co. v. Ross, 2 Md. Ch 25; Sleeper v. Chapman, 121 Mass 404; Sumner v. Waugh, 56 Ill. 531; Winter v. Belmont M. Co., 53 Cal. 428. In this

extend to the assignment of ordinary choses in action the well-settled doctrines which apply to the assignment of negotiable instruments. The better doctrine, however, is, and the one which is settled by the weight of authority, that the right of the second assignee under such circumstances, is subject to all the equities existing in favor of the original parties. The original assignee can not convey a greater title or interest in the subject of assignment than he himself has.[1] Where, however, the owner by his own affirmative act has conferred the apparent title and absolute ownership upon an assignee, upon the faith of which the chose in action has been purchased for value by a second assignee, the owner is precluded from asserting his real title, as against such subsequent purchaser, by the application of the doctrine of estoppel. This rule, although it has generally been applied to transfers of stock certificates has been extended by some courts to assignments of various other kinds of choses in action.[2]

In order to give a debtor, when sued by the assignee, the right to set off a demand against the assignor, it is necessary that such demand should have been due and payable at the time of the assignment, and not have matured afterwards.[3] In California, however, a demand which has accrued prior to notice of the assignment is allowed to be set off.[4] Negotiable paper, assigned after maturity is subject to the same rules in regard to

latter case the plaintiff, the owner of certain shares of stock, transferred them on the books of the company in the name of M., to whom a certificate was issued. M. afterwards indorsed the certificate in blank and delivered it to the plaintiff. He then stole the certificate from the plaintiff and sold it to a *bona fide* purchaser. The court held that the title of the purchaser was superior to that of the real owner.

[1] Bush v. Lathrop, 22 N. Y. 535; Anderson v. Nicholas, 28 Id. 600; Reeves v. Kimball, 40 Id. 299; Mason v. Lord, Id. 476; Schafer v. Reilly, 50 Id. 61; Reid v. Sprague, 72 Id. 457; McNeil v. Tenth Nat. Bank, 55 Barb. 59; Williams v. Thorn, 11 Paige Ch. 459; Bradley v. Root, 5 Id. 632; Marvin v. Inglis, 39 How. Pr. 329; Poillon v. Martin, 1 Sandf. Ch. 569; Judson v. Corcoran, 17 How. 612; Ballard v. Burgett, 40 N. Y. 314; Davis v. Bechstein, 69 Id. 440; Ingraham v. Disborough, 47 Id, 421; Ledwich v. McKim, 53 Id. 307; Cutts v. Guild, 57 Id. 229; Barry v. Eq. L. Ins. Co., 59 Id. 587; Trustees etc. v. Wheeler, 61 Id. 88; Sherwood v. Meadow etc. Co, 50 Cal. 412.

[2] McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Holbrook v. N. J. Zinc Co., 57 Id. 616; Combes v. Chandler, 33 Ohio St. 178; Moore v. Metropolitan Bank, 55 N. Y. 41; Farmers' National Bank v. Fletcher, 44 Iowa, 252.

[3] Beckwith v. Union Bank, 9 N. Y. 211; Smith v. Felton, 43 Id. 419; Barlow v. Meyers, 6 N. Y. Sup. Ct. 183; Meyers v. Davis, 22 N. Y. 489; Chance v. Isaacs, 5 Paige, 592; Bradley v. Angeli, 3 N. Y. 475; Martin v. Kunzmuller, 37 Id. 396; Watt v. Mayor, 1 Sandf. 23; Wells v. Stewart, 3 Barb. 40; Ogden v. Prentice, 33 Id. 160; Adams v. Rodarmel, 19 Ind. 339; Walker v. McCay, 2 Metc. 294; Williams v. Brown, 2 Keyes, 486.

[4] McCabe v. Grey, 20 Cal. 509.

set-off as other choses in action not negotiable.[1] In order to entitle a defendant to set off a demand, it is necessary that the claim asserted against him should affect him in the same character as the demand attempted to be set off. Thus one sued as an individual can not set off a demand due him as an executor.[2] When notice of the assignment is required to be given by the assignee to the debtor, an actual notice is not necessary. Any notice which would put a reasonable man on inquiry is sufficient.[3] One who sues as assignee can not maintain his title by proof of an assignment made after suit brought.[4] But a neglect to record an assignment within the statutory period fixed therefor, in cases where an assignment must be recorded, does not make it fraudulent.[5]

§ 350. By Assignee, where Plaintiff is Trustee.

Form No. 71.

[TITLE]

The plaintiff complains, as assignee, for the benefit of [state whom], and alleges:

I. [State a cause of action accrued to the assignor.]

II. That on the ..... day of ....., 18..., the said C. D. assigned all his property, including the said claim, to the plaintiff, in trust, for the purpose of [state the purpose].

[DEMAND OF JUDGMENT.]

§ 351. Who are Trustees, and when may Sue Alone.

The provisions of the various codes provide in effect, although there is some slight difference in their language, that "an executor, or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section."[6] In order to entitle a trustee to sue alone, it is necessary that the trust should be express, that is, a trust created by the direct and positive act of the parties, by some writing, deed, or will, or by the proceedings of a court.[7]

[1] Harris v. Burwell, 65 N. C. 584; Leavenson v. Lafontane, 3 Kans. 523; Norton v. Foster, 12 Id. 44.

[2] Barlow v. Myers, 6 N. Y. Sup. Ct. 183.

[3] Wilkins v. Batterman, 4 Barb. 47; Williamson v. Brown, 15 N. Y. 354.

[4] Garrigue v. Loescher, 3 Bosw. 578.

[5] Denzer v. Mundy, 5 Rob. 636

[6] Ariz., sec. ——; Cal., sec. 369; Col. sec. 5; Dak., sec. 66; Fla., sec. 64; Idaho, sec. 6; Ind., sec. 4; Iowa, sec. 2544; Kan., sec. 28; Ky., sec. 33; Minn., sec. 28; Mon., sec 6; Nev., sec. 6; N. Y., sec. 449; N. C., sec. 57; Neb., sec. 30; Ohio, sec. 27; Or., sec. 29; S. C., sec. 139; Wash., sec. 4; Wy., sec. 34; Wis., c. 122, sec. 14.

[7] Considerant v. Brisbane, 22 N. Y. 389.

Among such trustees which have been permitted to sue alone, without joining the person for whose benefit the action is prosecuted, have been included: assignees for the benefit of creditors;[1] one who holds a security which is to be collected and applied to the payment of a debt due by himself;[2] the assignee of a stock subscription;[3] the president or treasurer of an incorporate association;[4] or the nominal proprietor of an individual bank;[5] trustees for the separate use of married women;[6] trustee to whom personal property is conveyed for the use of a husband and wife for life, with remainder to their children, in an action to recover the wrongful conversion of the property during the life-time of the parents;[7] a receiver appointed in another state;[8] a grantee of lands in trust, in actions for the possession or to recover damages for trespass.[9] In California, the priest who appears to have charge of church property is the proper party plaintiff in all actions concerning it. This would appear, however, to depend entirely upon the fact of in whom the title stands, and whether the society is incorporated, and how incorporated.[10]

§ 352. **Persons with Whom or in whose Name a Contract is Made** for the benefit of another, although not necessarily trustees of an express trust, are made so by the statute, and may maintain an action in their own name. The circumstances under which this rule is generally applied are, where an agent enters into a contract in his own name, and the promise is made directly to him, and not to the principal. In such case the agent is permitted to sue alone, although of course an action might also be maintained in the name of the principal. And it makes no difference as to the agent's right to maintain the action, whether the principal was known or disclosed at the time of the contract or not.[11] As illustrations of all kinds of

[1] Mellen v. Hamilton F. Ins. Co., 5 Duer, 101; Ryerss v. Farwell, 9 Barb. 615; Lewis v. Graham, 4 Abb. Pr. 106; Fletcher v. Derrickson, 3 Bosw. 181; St. Anthony's Mill Co. v. Vandall, 1 Minn. 246; Foster v. Brown, 65 Ind. 284; McClain v. Weidenmeyer, 25 Mo. 364; Cummins v. Barkalow, 4 Keyes, 514.

[2] Gardinier v. Kellogg, 14 Wis. 605; Davidson v. Elms, 67 N. C. 228; Moorehead v. Hyde, 38 Iowa, 382; Thompson v. Toland, 48 Cal. 99; Clark v. Titcomb, 42 Barb. 122.

[3] Kimball v. Spicer, 12 Wis. 668.

[4] Tibbetts v. Blood, 21 Barb. 650.

[5] Burbank v. Beach, 15 Barb. 326.

[6] Reed v. Harris, 7 Robt. 151.

[7] Gibbens v. Gentry, 20 Mo. 468; see also Richardson v. Means, 22 Mo. 495.

[8] Runk v. St. John, 29 Barb. 585; Lathrop v. Knapp, 37 Wis. 307; Garner v. Kent, 70 Ind. 428; Hope Life Ins. Co. v. Taylor, 2 Robt. 278.

[9] Goodrich v. Milwaukee 24 Wis. 422; Boardman v. Beckwith, 18 Iowa, 292; Holden v. N. Y. & Erie Bank, 72 N. Y. 286; Tyler v. Granger, 48 Cal. 259; McKinnon v. McKinnon, 81 N. C. 201.

[10] Santillan v. Moses, 1 Cal. 92.

[11] Morgan v. Reed, 7 Abb. Pr. 215; St. John v. Griffith, 2 Id. 198; Erickson v. Compton, 6 How. Pr. 471; Con-

agents who are thus permitted to maintain an action in their own name, may be mentioned, ordinary mercantile factors, who transact business in their own name;[1] an auctioneer;[2] the managing owner of a vessel;[3] a contractor for the benefit of third parties;[4] the outgoing trustees of an association;[5] the agent for a foreign principal, or officer of a foreign bank or government;[6] a sheriff, for the purchase price of property sold on execution;[7] payee of a note, for the benefit of others;[8] the people, where bonds are taken in their name for the benefit of individuals,[9] and on the same principle bonds given to superior officers for the faithful discharge of the duties of the obligor.[10] On the other hand one who is a mere agent, not embraced within the description of the statute, can not prosecute an action in his own name, on a contract made in the name of his principal.[11]

§ 353. **Averment of Trustee—Relation.**—In an action brought by an express trustee, or by one in whose name a contract is made for the benefit of another, the general rule of pleading, that the plaintiff must show title in himself in the capacity in which he sues, prevails. Unless, therefore, the description of the obligation, and the breach thereof, disclose such facts, the complaint must make a positive and issuable averment of the trust or agency.[12] Thus, one who claims as a

siderant v. Brisbane, 22 N. Y. 389; Rowland v. Phalen, 1 Bosw. 43; Cheltenham Fire-brick Co. v. Cook, 44 Mo. 20; Wright v. Tinsley, 30 Id. 389; Weaver v. Trustees, 28 Ind. 112; Rice v. Savery, 22 Iowa, 470; Winters v. Rush, 34 Cal. 136; Ord v. McKee, 5 Id 515; Scantlin v. Allison, 12 Kans. 85; Noe v. Christie, 51 N. Y. 270; Hubbell v. Medbury, 53 Id. 98; Presb. Soc. v. Beach, 8 Hun, 644; People v. Slocum, 1 Idaho, 62; Thompson v. Fargo, 63 N. Y. 479; Grinnell v. Schmidt, 2 Sandf. 706; Union India Rubber Co.v. Tomlinson, 1 E. D. Smith, 364; Van Lien v. Byrnes, 1 Hilt. 133; Higgins v. Senior, 8 M. & W. 834.

[1] Grinnell v. Schmidt, 2 Sandf. 706.

[2] Bogart v. O'Regan, 1 E. D. Smith, 590; Hulse v. Young, 16 Johns. 1; Minturn v. Maine, 3 Seld. 220; Minturn v. Allen. 3 Sandf. 399.

[3] Ward v. Whitney, 3 Sandf. 399; Kennedy v. Eilau, 17 Abb. Pr. 78; Houghton v. Lynch, 13 Minn. 85.

[4] Rowland v. Phalen, 1 Bosw. 43.

[5] Davis v. Garr, 2 Seld. 124.

[6] Considerant v. Brisbane, 22 N. Y. 389; Habicht v. Pemberton, 4 Sandf. 657; Myers v. Machado, 6 Duer, 678; Peel v. Elliott, 16 How. Pr. 483; Repub. of Mex. v. Arrangois, 11 Id. 1.

[7] Armstrong v. Vroman, 11 Minn. 220; McKee v. Lineberger, 69 N. C. 217.

[8] Scantlin v. Allison, 12 Kan. 85; Ord v. McKee, 5 Cal. 515.

[9] People v. Norton, 5 Seld. 176; Bos. v. Seaman, 2 C. R. 1; People v. Laws, 3 Abb. Pr. 450; People v. Walker, 21 Barb. 630; Hunter v. Commissioners, 10 Ohio St. 515; State v. Moore, 19 Mo. 369; Meier v. Lester, 21 Id. 112; Shelby Co. v. Simmonds, 33 Iowa, 345; Annett v. Kerr, 28 How. Pr. 324; People v. Townsend, 37 Barb. 520; Baggott v. Boulger, 2 Duer, 160.

[10] Stillwell v. Hurlbert, 18 N. Y. 374; Fuller v. Fullerton, 14 Barb. 59; People v. Clark, 21 Id. 214; People v. Norton, 9 N. Y. 176.

[11] Swift v. Swift, 46 Cal. 266; Robbins v. Deverill, 20 Wis. 150; Redfield v. Middleton, 7 Bosw. 649; Rawlings v. Fuller, 31 Ind. 255; White v. Chouteau, 10 Barb. 202.

[12] Freeman v Fulton Fire Ins. Co., 13 Abb. Pr. 124.

substituted trustee under a will, should state all the material facts distinctly in his bill. If the will provides two modes for the appointment of new trustees, he must state in which mode he was appointed.[1]

§ 354. **Cestui que Trust, when may Sue.**—A *cestui que trust* of an express trust has no right of action until the trust is denied, or some act is done by the trustees inconsistent with the trust; and until then the statute of limitations does not begin to run. Thus, when a person takes a title in his own name, at the request of another, who furnishes the consideration, the former has the right to presume that he is to hold it until a demand is made upon him for it.[2] And where the share of one of several *cestuis que trust* in a trust fund is ascertained and known, he may maintain a suit for a breach of the trust against the trustees, without joining the other *cestuis que trust*.[3]

§ 355. **Notice of Trust.**—Where an assignment is made to one as trustee of a mercantile firm, and he receives from an obligor a deed for land to members of the firm, and the firm sold the land to their successors in business, some of the original firm being a portion of such successors, the purchasers are chargeable with notice of the trust.[4]

§ 356. **Trust Deed.**—In Nevada, under section 55 of the statute concerning conveyances (Statutes of 1861), a declaration of trust as to land must be by deed or conveyance, in writing, subscribed by the party declaring the same, or by his lawful agent thereunto authorized by writing.[5]

§ 357. **Who may Assign.**—An administrator of an estate in New York may assign a judgment obtained there by an intestate against one who has since removed to California.[6]

§ 358. **Where Plaintiff is a Devisee.**

Form No. 72.

[Title.]

The plaintiff, as devisee of A. B., deceased, complains, and alleges:

I. [State cause of action accrued to deceased.]

II. That the said A. B. was seised of the estate hereinbefore mentioned, and that he died on the ..... day of ....., 18..., at ....., and by his last will devised the same to this plaintiff.

[Demand of Judgment.]

[1] Cruger v Halliday, 11 Paige, 314.
[2] White v. Sheldon, 4 Nev. Rep. 280.
[3] Pickering v. De Rochemont, 45 N. H. 67.
[4] Connelly v. Peck, 6 Cal. 348.
[5] Sime v. Howard, 4 Nev. 473.
[6] Low v. Burrows, 12 Cal. 181.

§ 359. **Assets, Allegation of.**—Where one of several heirs is sued on his promise to pay the debt of the ancestor, the plaintiff need not allege that the defendant or heirs had assets.[1] Where the will by construction shows an intention to charge the real estate with the payment of a legacy, it is not necessary to aver in the bill a deficiency of personal assets.[2] The above form of allegation is sufficient on demurrer.[3]

§ 360. **By an Assignee for the Benefit of Creditors.**

Form No. 73.

[Title.]

The plaintiff as assignee for the benefit of the creditors of ....., complains of the defendant, and alleges:

I. [State a cause of action accrued to the assignor.]

II. That on the ..... day of ....., 18 .., at ....., the said ..... assigned all his property, including the said claim, to the plaintiff [in trust for the purpose of paying all his debts].

[Demand of Judgment.]

§ 361. **An Assignee for the Benefit of Creditors is a Trustee** of an express trust, and as such he is entitled to sue,[4] or to defend an action, without joinder of a beneficiary.[5] He must allege in his complaint that he sues as such, or the court will not relieve him from payment of costs in case he fails in the action.[6] For any other purpose this allegation is unnecessary, as he is assignee of an express trust, has the entire legal title, and may sue in his own name without referring to his character as assignee.[7] But an assignment by a creditor of a portion of a debt does not make the assignee joint owner of the whole, and he is not a necessary party in a suit for its recovery.[8]

§ 362. **Assignee in Bankruptcy.**—Proceedings in bankruptcy do not affect the previously acquired right of an assignee of a chose in action to sue in the bankrupt's name.[9] In Connecticut, the insolvent act of 1853 provides that all the property of the debtor shall be vested in the trustee, and that the trustee may sue in his own name on all choses in action.[10]

[1] Elting v. Vanderlyn, 4 Johns. 237.
[2] Lewis v. Darling, 16 How. U. S. 1.
[3] Spier v. Robinson, 9 How. Pr. 325.
[4] 1 Daniell, 224; Spragg v. Binkes, 5 Ves. 587; De Golls v. Ward, 3 P. Wms. 311; Kaye v. Fosbroke, 8 Sim. 28; Dyson v. Hornby, 7 De G. M. & G. 1.
[5] Collet v. Woolaston, 3 Bro. C. C. 228; Lloyd v. Lander, 5 Mad. 282; Sells v. Hubbell; 2 Johns. Ch. 394; Springer v. Vanderpool, 4 Edw. Ch. 362; Wakeman v. Grover, 4 Paige Ch. 23; Dias v. Bouchaud, 10 Id. 445.
[6] Murray v. Hendrickson, 6 Abb. Pr. 96; 1 Bosw. 635.
[7] Butterfield v. Macomber, 22 How. Pr. 150.
[8] Leese v. Sherwood, 21 Cal. 152.
[9] Hayes v. Pike, 17 N. H. 564.
[10] Hart v. Stone, 30 Conn. 94.

In an action brought by an assignee in bankruptcy, as the title of the plaintiff does not depend upon the voluntary acts of the parties, a general allegation of assignment is not sufficient. The plaintiff must set out the facts in connection with his appointment. Such facts must be alleged in a manner sufficient to show that an appointment has been made, and so as to be triable.[1] An allegation that the plaintiff was duly appointed on a certain day is insufficient.[2] In an action brought by a receiver of a bank, a complaint which showed such fact, and that the appointment was made by the supreme court, by an order made upon a certain day, upon filing security, and that such security had been filed was held sufficient.[3] In Ohio a similar averment was held good on demurrer, although it could be taken advantage of on motion.[4] It is irregular, however, to allege that the demand is the property of the assignor, or that the defendant is indebted thereon to the assignor.[5]

§ 363. **Who May Assign.**—One partner of a firm, sole manager, his copartners being absent at a great distance, may assign the firm property, in trust, for the benefit of creditors, if necessary for their protection.[6]

CHAPTER II.

JOINT TENANTS AND TENANTS IN COMMON.

§ 364. **By Joint Tenants and Tenants in Common.**

Form No. 74.

[TITLE.]

The plaintiffs complain and allege:

I. That the property hereinafter mentioned and described is owned in common by the plaintiffs.

II. [State cause of action.]

[DEMAND OF JUDGMENT.]

§ 365. **Who are Tenants in Common or Joint Tenants.** The rule which prevails in a majority of the states of the Union is, that when two or more persons succeed by inheritance to the same land, or it is conveyed to them by the same instrument, without express direction to the contrary, their interests are those of tenants in common, and not of joint tenants.[7]

[1] White v. Low, 7 Barb. 206.

[2] Gillet v. Fairchild, 4 Denio, 80; White v. Joy, 3 Kern. 83; Bangs v. McIntosh, 23 Barb. 591.

[3] Stewart v. Beebe, 28 Barb. 34.

[4] Schrock v. City of Cleveland, 29 Ohio St. 499.

[5] Palmer v. Smedley, 28 Barb. 468; S. C., 6 Abb. Pr. 205; compare Myers v. Machado, Id. 198; S. C., 14 How. Pr. 149.

[6] Forbes v. Scannell, 13 Cal. 242.

[7] 1 Wash. on Real Prop. 409, and note.

§ 366. **Legal Actions by Owners in Common or Joint Owners of Land.**—The provisions of the codes of the various states provide that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided,"[1] and "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff can not be obtained, he may be made a defendant, the reason thereof being stated in the complaint."[2] In the interpretation of these provisions in reference to actions brought by tenants in common or joint tenants of land, it has been held that in an action to recover an entire rent from the lessee, or from one to whom it has been paid, all the tenants in common may join.[3] This, however, is unnecessary, as one may maintain an action to recover his moiety of the rent, although it may be entire.[4] To recover for torts done to the land, such as nuisances and trespasses, the rule is the same as it was at the common law, and all the tenants in common must join.[5] And the same rule applies in actions to recover for fraud in the sale of land to several tenants in common.[6]

§ 367. **Actions to Recover Possession of Land.**—In actions to recover the possession of land, all the owners in common may join.[7] Or each may sue to recover his undivided share.[8] Whether, in such action, one tenant in common can recover more than his undivided share, where the entire land is

[1] Arizona, sec. 12; California, secs. 378, 381; Colorado, sec. 11; Dakota, sec. 70; Florida, sec. 68; Idaho, sec. 12; Indiana, sec. 17; Iowa, sec. 2545; Kansas, sec. 35; Kentucky, sec. 34; Montana, sec. 12; Minnesota, sec.—; Missouri, art. 1, sec. 4; Nevada, sec. 12; New York, sec. 446; Nebraska, sec. 37; North Carolina, sec. 60; Oregon, sec. 380; South Carolina, sec. 140; Washington, sec. 8; Wisconsin, c. 122, sec. 18; Wyoming, sec. 40.

[2] Arizona, sec. 14; California, sec. 382; Colorado, sec. 13; Dakota, sec. 72; Florida, sec. 40; Idaho, sec. 14; Indiana, sec. 19; Iowa, sec. 2548; Kansas, sec. 37; Kentucky, sec. 36; Minnesota, sec. —; Missouri, art. 1, sec. 6; Montana, sec. 14; Nevada, sec. 14; Nebraska, sec. 39; New York, sec. 448; North Carolina, sec. 62; Oregon, sec. 381; South Carolina, sec. 142; Washington, sec. 8; Wisconsin, c. 122, sec. 20; Wyoming, sec. 42.

[3] Marshall v. Moseley, 21 N. Y. 280.

[4] Cruger v. McLaury, 41 N. Y. 219; Jones v. Felch, 3 Bosw. 63; Porter v. Bleiler, 17 Barb. 149.

[5] De Puy v. Strong, 37 N. Y. 372; Hill v. Gibbs, 5 Hill, 56; Parke v. Kilham, 8 Cal. 77; Wausau Boom Co. v. Plumer, 49 Wis. 112; Schiffer v. Eau Claire, 51 Id. 385; Seymour v. Carpenter, Id. 413; Van Deusen v. Young, 29 Barb. 9; Samuels v. Blanchard, 25 Wis. 329; Alford v. Dewin, 1 Nev. 207; May v. Slade, 24 Tex. 205; White v. Brooks, 43 N. H. 402; Bullock v. Hayward, 10 Allen, 460; Mobley v. Bruner, 59 Pa. St. 481.

[6] Lawrence v. Montgomery, 37 Cal. 183; Foster v. Elliott, 33 Iowa, 216.

[7] Hasbrouck v. Bunce, 65 N. Y. 472; Cook v. Wardens of St. Paul's Ch., 5 Hun, 293; Cruger v. McLaury, 41 N. Y. 219; Fisher v. Hall, Id. 416.

[8] Morenhaut v. Wilson, 52 Cal. 262; Goller v. Fett, 30 Cal. 481; Covillaud v. Tanner, 7 Id. 38.

held adversely by the defendant, is a question on which the authorities materially differ. In some of the states the recovery of the tenant in common is limited to the amount to which he can show title in himself; that is, to his own share.[1] On the other hand, the rule is equally well settled in other of the states, that one tenant in common can recover possession of the entire premises as against a mere trespasser without joining his cotenants, either as plaintiffs or defendants.[2] The reasons of this rule are that one tenant in common has a right of enjoyment of and possession to the whole of the common property, and although he can not possess in severalty before partition, still each and every one of them has a right to enter upon and occupy the whole of the common lands, and every part thereof.[3] In most of the states, although their codes permit actions to be brought either by all the tenants in common for the whole of the common property, or by one for his undivided share, they do not permit actions to be brought by more than one and less than all.[4] In California, however, a special provision of the code permits any number of joint owners, or owners in common, either to commence or to defend such actions.[5] And the same is so in Missouri and Nevada.[6] The code of California also provides that "any two or more persons claiming any estate or interest in lands, under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same."[7]

§ 368. **Action by Tenant in Common against Cotenant.**—In an action by a tenant in common against his cotenant, in the sole possession of the premises, to recover a share of the profits of the estate, a complaint which avers a tenancy in

[1] Mobley v. Bruner, 59 Pa. St. 481; Minke v. McNamee, 30 Md. 294; Gray v Givens, 26 Mo. 291; Dewey v. Brown, 2 Pick. 387.

[2] Treat v. Reilly, 35 Cal. 129; Hart v. Robertson, 21 Id. 346; Winthrop v. Grimes, Wright, 330; Dolph v. Barney, 5 Or. 191; French v. Edwards, 5 Saw. 266; Le Franc v. Richmond, Id. 601; Sharon v. Davidson, 4 Nev. 416; Hibbard v. Foster, 24 Vt. 542; Robinson v. Roberts, 31 Conn 145; Collier v. Corbett, 15 Cal. 183; Stark v. Barrett, 15 Id. 361.

[3] Tevis v. Hicks, 38 Cal. 234; Carpentier v Webster, 27 Id. 545.

[4] Fisher v. Hall, 41 N. Y. 416; Hubbell v. Leech, 58 Id. 237; Hasbrouck v. Bunce, 62 Id. 475

[5] Cal. Code Civ. Proc., sec. 384; Goller v. Fett, 30 Cal. 481; Touchard v. Keyes, 21 Id. 202; Reynolds v. Hosmer, 45 Id. 616.

[6] Wag. Stat. 558, sec. 3; Comp. Laws Nev. 1873, sec. 1077.

[7] California Code of Civ. Proc., sec. 381.

common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues, and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal; and that the rents, issues and profits amount to eighty-four thousand dollars, is insufficient to support the action. The action is a common-law action of account; and, viewed in this light, the complaint should aver that the defendant occupied the premises upon an agreement with the plaintiff, as receiver or bailee of his share of the rents and profits. It is essential to a recovery that it be alleged.[1] A tenant in common may maintain a bill in equity against his co-tenant who has exclusively occupied a salt well and works, and a coal mine, the common property, for an account of rents and profits. The defendant, in such case, is liable for "receiving more than comes to his just share or proportion," under Stat. 4 Anne, c. 16, sec. 27.[2] A tenant in common of lands, employed as agent by common agreement between himself and co-tenant, to take charge of the land, make sales thereof at certain prices, receiving a commission of five per cent on sales, may sue his co-tenant for services in respect to the land outside of selling it.[3] Several persons owning a tract of mining claims, as tenants in common, acting under a company name, can not in the name of the company, take or hold the interest of any one or more by forfeiture.[4] If two are tenants in common of personal property, and the sheriff, in an action against one of them, attaches his interest in the common property, he may take all the property into his possession without being guilty of a conversion of the other tenant's share.[5]

[1] Pico v. Columbet, 12 Cal. 414.
[2] Earley v. Friend, 10 Gratt. 21.
[3] Thompson v. Salmon, 18 Cal. 632.
[4] Wiseman v. McNulty, 25 Cal. 230; Dutch Flat Co. v. Mooney, 12 Id. 534.
[5] Veach v. Adams, 51 Cal. 609

CHAPTER III.

CORPORATIONS.

§ 369. By a Foreign Corporation.

Form No. 75.

[TITLE.]

THE ..... COMPANY, Plaintiff,
against
JOHN DOE, Defendant.

The plaintiff complains, and alleges:

I. That it is a corporation organized and existing under the laws of the state of Nevada, for the purpose of [here state the purpose], and is doing business as such in its said corporate name.

II. [State the cause of action.]

[DEMAND OF JUDGMENT.]

§ 370. Existence of Foreign and Domestic Corporations.—Although a corporate body may carry on business beyond the territorial limits of the state which created it, it has no corporate existence beyond those limits,[1] and a corporation which owes its existence to the laws of several states must be considered as a domestic corporation in each of such states.[2] In the latter case each charter creates a legal entity to be recognized within its own state.[3] In the case of a foreign corporation its existence is a question of fact, which it has been held is for the jury to determine.[4] The right of a domestic corporation to act as such cannot be questioned collaterally.[5] And where defendants are alleged to be a corporation doing business within the state, courts will not presume as a matter of law that it is a foreign corporation.[6] The national banks organized and doing business under the acts of congress are to be regarded as foreign corporations, within the provisions of the code of procedure authorizing actions to be brought and attachments to be issued against corporations.[7]

§ 371. Rights and Liabilities of Foreign Corporations.—When a foreign corporation comes by its officers within the juris-

[1] Day v. Newark India Rubber Co., 1 Blatchf. 628; Bank of Augusta v. Earle, 13 Pet. 588; Ohio & M. R. R. Co. v. Wheeler, 1 Black. 286.

[2] State v. Northern Central Railway Co., 18 Md. 193; Sprague v. Hartford etc. R. R. Co., 5 R. I. 233.

[3] Ohio & Miss. R. R. Co. v. Wheeler, 1 Black. 286.

[4] Lindaur v. Delaware Ins. Co., 18 Ark. 461.

[5] Dean v. Davis, 51 Cal. 407.

[6] Acome v. American Mineral Co., 11 How. Pr. 24.

[7] Bowen v. First Nat. Bank of Medina, 34 How Pr. 403; Cooke v. State Nat. Bank of Boston, 8 Abb. Pr., N. S., 339.

diction of another state to engage in business, it becomes amenable to the laws of the latter state, and can not escape the consequences of its illegal acts by setting up its existence under a foreign government.[1] Such corporations are deemed "persons," within the meaning of the statute relating to taxation, unless a different intent is indicated in the statute.[2]

In New York one foreign corporation may sue another in the courts of that state, upon a cause of action arising in it.[3] But a complaint against a foreign corporation must either allege that the plaintiffs are residents of that state, or that the cause of action arose, or the subject of the action is situated, within the state. If such allegations are omitted, the complaint may be dismissed on motion.[4] A corporation created by the laws of one state, and composed entirely of citizens of that state, is not entitled to all the privileges and immunities of citizens of another state in which it may be engaged in business.[5] Nor is it entitled to privileges which by the statutes of the latter are confined to corporations created by the laws of that state.[6] Nor does the provision of the United States constitution, guaranteeing to citizens of each state all the privileges and immunities of citizens in the several states, prevent a state from regulating or restricting the business of a corporation created by the laws of another state, and imposing terms on its right to carry on business within its boundaries.[7] In a recent case in the court of appeals of New York, the nature and extent of state jurisdiction, and the duty of the comity which one state owes to foreign states, were considered and explained.[8]

§ 372. By or against a Domestic Corporation.

Form No. 76.

[TITLE.]

The plaintiff complains, and alleges:

I. That it is a corporation organized and existing under the laws of this state, and as such doing business in its corporate

[1] Austin v. N. Y. & Erie R. R. Co., 1 Dutch. 381; People v. Cent. R. R. Co. of N. J., 48 Barb. 478; Warren Mfg. Co. v. Ætna Ins. Co., 2 Paine, 501.

[2] British Comm. Life Ins. Co. v. Com'rs of Taxes, 28 How. Pr. 41.

[3] Bank of Commerce v. Rutland & Wash. R. R. Co., 10 How. Pr. 1.

[4] House v. Cooper, 16 How. Pr. 292.

[5] Bank of Augusta v. Earle, 13 Pet. 519.

[6] Myers v. Manhattan Bank, 20 Ohio, 283.

[7] Paul v. Virginia, 9 Wall. 168; Ducat v. Chicago, 10 Id. 410; Liverpool Ins. Co. v. Massachusetts, Id. 567; Ins. Co. v. Morse, 20 Id. 457; Louisiana v. Lathrop, 10 La. Ann. 398; Doyle v. Continental Ins. Co., 94 U. S. 540; Lamb v. Lamb, 6 Biss. 420; Hoffman v. Banks, 41 Ind. 1; Rising Sun Ins. Co. v. Slaughter, 20 Id. 520; Wash. Co. M. Ins. Co. v. Hasting, 84 Mass. 398; Williams v. Cheney, 74 Id. 20; Ins. Co. v. N. O., 1 Woods, 89; Ex parte Robinson, 12 Nev. 263; Ex parte Cohn, 13 Id. 424.

[8] Merrick v. Van Santvoord, 34 N. Y. 208.

name of [insert name of corporation], [or that the defendant is a corporation created by and existing under the laws of this state].

II. [State cause of action, etc.]

[Demand of Judgment.]

§ 373. **Allegation of Corporate Existence.**—In the common-law system of pleading, in an action brought by a corporation, the rule was established by the weight of authority, that the declaration need not contain an allegation of corporate existence, although the plaintiff is not such a corporation that its existence will be judicially taken cognizance of.[1] Under such system the defendant might join issue on the fact of the plaintiff's corporate capacity, so as to compel it to give evidence thereof. How such issue was joined differed in the several states. In England, and in many of the states, pleading the general issue was sufficient.[2] On the contrary, other states established the rule that by pleading the general issue, the plaintiff's corporate capacity was admitted, and if the defendant wished to raise an issue to such fact it must be by a plea in abatement or a plea in bar.[3]

In those states which have adopted codes of procedure, the question whether or not a corporation must allege its corporate existence, in an action brought by it, has been answered in so many ways that it is difficult, if not impossible, to reconcile the decisions. Some of the states have made special enactments which cover this question. Thus the code of Iowa provides that "a plaintiff, suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership representative, or other than individual capacity, need not state

[1] Ang. & Ames on Corp., sec. 632, (n) 2; Harris v. Muskingum Mfg. Co., 4 Blackf. 267; Bennington Iron Co. v. Rutherford, 18 N. J. L. 107; Rees v. Conococheague Bank, 5 Rand. 326; Richardson v. St. Joseph Iron Co., 5 Blackf. 146; Zion Church v. St. Peter's Church, 5 Watts & S. 215; Union Mut. Ins. Co. v. Osgood, 1 Duer. 707; Kennedy v. Cotton, 28 Barb. 59; La Fayette Ins. Co. v. Rogers, 30 Id. 491; Phœnix Bank v. Donnell, 41 Id. 571; Frye v. Bank of Illinois, 10 Ill. 332; Hensten v. Cincinnati etc. R. R., 16 Ind. 275; German Ref. Ch. v. Von Puechelstein, 27 N. J. Eq. 30; Gillett v. American etc. Ware Co., 29 Gratt. 565; Odd Fellows' Bld. Assoc. v. Hogan, 28 Ark. 261; Wilson v. Sprague M. M. Co., 55 Ga. 672; Adams Express Co. v. Hill, 43 Ind. 157.

[2] Rees v. Conococheague Bank, 5 Rand. 326; Hargrave v. Bank of Illinois, Breese, 122; Jones v. Bank of Illinois, Id. 124; Lewis v. Bank of Ky., 12 Ohio, 132; Henriques v. Dutch West India Co., 2 Ld. Raym. 1535; Jackson v. Plumbe, 8 Johns. 378; Dutchess Mfg. Co. v. Davis, 14 Id. 215; Bank of Auburn v. Weed, 19 Id. 303; McDonald v. Neilson, 2 Cow. 139.

[3] Society etc. v. Pawlet, 4 Pet. 480; Zion Church v. St. Peter's Church, 5 Watts & S. 215; Christian Society v. Macomber, 3 Metc. 235; School District v. Blaisdell, 6 N. H. 197; Langdon v. Potter, 11 Mass. 313; Boston Type Foundry v. Spooner, 5 Vt. 93.

the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and when defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in the same general way."[1] In Minnesota it is provided, that "in actions by or against corporations created by or under the laws of this state, it is sufficient to refer in the complaint or answer, to the act of incorporation, or the proceeding by which such corporation was created." In that state it has been held, that where the statute creating the corporation requires certain acts to be done before it can be considered *in esse*, the complaint must show that such acts have been done.[2] In California, the allegation that the plaintiff is a corporation, organized and existing under the laws of the state, has been held on demurrer, a sufficient allegation of the plaintiff's corporate capacity.[3] And the same allegation has been held sufficient in Iowa under the statute;[4] and in Minnesota.[5] In Kansas the common-law rule seems to have been adopted, and no allegation that the plaintiff is a corporation is essential.[6] And the same is true in Indiana.[7] In Wisconsin it is provided by statute, that the plaintiff need not prove its corporate existence, unless it has been specially denied, and that the allegation thereof may be made by reference to the title of the act of incorporation. And this rule applies to foreign as well as to domestic corporations.[8] In New York, in suits by a domestic corporation, it is not necessary to allege the plaintiff's incorporation, because by the provisions of the revised statutes, which have been held to be in force notwithstanding the enactment of the code of procedure, proof of such incorporation was not necessary, unless the defendant specially denied it.[9] In the case of a foreign corporation, however, there

[1] Code, 1873, sec. 2716; Code Proc., sec. 98.

[2] St. Paul Division No. 1 v. Brown, 9 Minn. 157.

[3] California Steam Nav. Co. v. Wright, 6 Cal. 258.

[4] Root v. Illinois Cent. R. R., 29 Iowa, 102; Savings Bank v. Horn, 41 Id. 55.

[5] Broome v. Galena etc. Packet Co., 9 Minn. 239; Dodge v. Minnesota Plastic etc. Co., 14 Id. 49.

[6] Ryan v. Farmers' Bank, 5 Kan. 658; Campbell v. Blanke, 13 Id. 62.

[7] O'Donald v. Evansville etc. R. R. Co., 14 Ind. 259.

[8] R. S., c. 148, secs. 8, 11; Farmers' Loan etc. Co. v. Fisher, 17 Wis. 114; Connecticut Mut. Life Ins. Co. v. Cross, 18 Id. 109. In this latter case it was held that in an action by a foreign insurance company to recover money loaned, it is not necessary to set out in the complaint *in hæc verba* that portion of the plaintiff's charter which confers the power to loan money.

[9] Shoe & Leather Bank v. Brown, 9 Abb. Pr. 218; Phœnix Bank v. Donnell, 40 N. Y. 410; Fulton Fire Ins. Co. v. Baldwin, 37 Id. 648; Union Marine Ins. Co. v. Osgood, 1 Duer, 707; Canandarqua Academy v. McKechnie, 19 Hun, 62; Acome v. American Min. Co., 11 How. Pr. 24; Lighte v. Everett Fire Ins. Co., 5 Bosw. 716; La Fayette Ins. Co. v. Rogers, 30 Barb. 491; Elizabethport Mfg. Co. v. Campbell, 13 Abb. Pr. 86.

is no such statute applicable, and its existence must be alleged, and proved on the trial.[1] It is not necessary, however, to set forth the specific powers of the corporation to enter into the transaction under which the cause of action arose.[2] But where an officer of a foreign corporation sues his in own name on behalf of his company, his complaint must state facts showing his authority to sue on their behalf. Merely alleging authority is not enough.[3] And whenever it is necessary to aver the existence of a corporation, it may be done by referring to the title of the act incorporating it, and the date of its passage. The substance thereof need not be set forth.[4] Where the original act is referred to in the complaint, a vague reference to other general statutes affecting it does not render the complaint demurrable;[5] but the title of the act must be set forth with accuracy.[6]

§ 374. **Collateral Attack on Corporate Existence.**— Where the plaintiff enters into a contract with a defendant, by a corporate name, and afterwards sues it as such corporation, the general rule established by the weight of authority is, that the defendant is estopped to deny its corporate existence.[7] The civil code of California, which provides a general law for the formation of corporations, has enacted that "if a corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation, its corporate powers cease. The due incorporation of any company, claiming in good faith to be a corporation under this part, and doing business as such, or its

[1] Waterville Mfg. Co. v. Bryan, 14 Barb. 182; Connecticut Bank v Smith, 9 Abb. Pr. 175; Myers v. Machado, 14 How. Pr. 149; Loaners' Bank v. Jacoby, 10 Hun, 143.

[2] Reformed Dutch Church v. Veeder, 4 Wend. 494; Struver v. Ocean Ins. Co., 9 Abb. Pr. 23; Perkins v. Church, 31 Barb. 84; Marine etc. Bank v. Jauncey, 1 Id. 486. Compare, however, Camden etc. Co. v. Remer, 4 Id. 127; Bard v. Chamberlain, 3 Sandf. Ch. 31, where it is said that the power of a foreign corporation to make the contract which is sought to be enforced must be set forth.

[3] Meyers v. Machado, 6 Abb. Pr. 198.

[4] California Code Civ. Proc., sec. 450; New York Code, sec. 163; United States Bank v. Haskins, 1 Johns. Cas. 132.

[5] Sun Mut. Ins. Co. v. Dwight, 1 Hilt. 50.

[6] Union Bank v. Dewey, 1 Sandf. 509. For form of averment, see New York Floating Derrick Co. v. New Jersey Oil Co., 3 Duer, 648.

[7] National Ins. Co. v. Bowman, 60 Mo. 252; Farmers' etc. Ins. Co. v. Needles, 52 Id. 17; Congregational Soc. v. Perry, 6 N. H. 164; Henriques v. Dutch West India Co., 2 Ld. Raym. 1535; People v. Ravenswood Turnpike Co., 20 Barb. 518; Connecticut Bank v. Smith, 17 How. Pr. 487; All Saints' Church v. Lovett, 1 Hall, 213; Ryan v. Vanlandingham, 7 Ind. 416; Brookville etc. Turnpike Co. v. McCarty, 8 Id. 392; Tar River Nav. Co. v. Neal, 3 Hawks, 520; Worchester Med. Inst v. Harding, 11 Cush. 285; but see *contra*, Welland Canal Co. v. Hathaway, 8 Wend. 480.

right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such *de facto* corporation may be a party, but such inquiry may be had at the suit of the state on information of the attorney-general."[1] The general rule thus reduced to statutory form in California has been adopted in many of the states, and may be considered as the correct statement of the law on this subject.[2]

§ 375. **Incorporation Inferred and how Proved.**—Where, in an action brought against the directors of a corporation, facts are stated in the complaint which shows that the defendants became a body corporate, no special averment to that effect

[1] California Civil Code, sec. 358.

[2] Oroville, etc., R. R. Co. v. Plumas County, 37 Cal. 855; Dannebroge Mining Co. v. Allment, 26 Id. 286; Stockton etc. Road Co. v. Stockton etc. R. R. Co., 45 Id. 680; Bakersfield T. H. Assn. v. Chester, 55 Id. 98; Hughes v. Bank of Somerset, 5 Litt. 45; Searsburg Turnpike Co. v. Cutler, 6 Vt. 315; Tar River Nav. Co. v. Neal, 3 Hawks, 520; Palmer v. Lawrence, 3 Sandf. 161; Brookville etc. Turnpike Co. v. McCarty, 8 Ind. 392; John v. Farmers' Bank, 2 Blackf. 367; Trumbull Mut. F. Ins. Co. v. Honer, 17 Ohio, 407; Rice v. Rock Island etc. R. R. Co., 21 Ill. 93; Tarbell v. Page, 24 Ill. 46. In Oroville etc. R. R. v. Plumas County, *supra*, in construing the section of the California code above cited, the court said: "This provision does not go to the extent of precluding a private person from denying the existence *de jure* or *de facto* of an alleged corporation. It can not be true that the mere allegation that a party is a corporation puts the question whether it is such a corporation beyond the reach of inquiry in a suit with a private person. It must be a corporation either *de jure* or *de facto*, or it has no legal capacity to sue or be sued, nor any capacity of any kind. It is an indispensable allegation in an action brought by a corporation, that the plaintiff is a corporation; and it results from the logic of pleading that the opposite party may deny the allegation. * * * It is not contemplated that the allegation that the company was duly organized should put the fact beyond dispute and dispense with all evidence. The statute furnishes a rule of evidence. It is declared that the due incorporation of any company shall not be inquired into collaterally in any private suit, etc., in a certain case; that is, when the company claims in good faith to be a corporation under the laws of the state, and is doing business as such corporation. The alleged corporation must claim in good faith that it is such a corporation; and then its due incorporation can not be inquired into collaterally. To say that the 'due incorporation' can not be inquired into collaterally, does not mean that no inquiry can be made as to whether it is a corporation. Many of the acts required to be performed in order to make a complete organization of the corporation may have been irregularly performed, or some of them may have been entirely omitted, and the rule of the statute is, that such irregular or defective performance shall not defeat the incorporation when drawn in question collaterally. The omission of the names and number of the first trustees from the articles of association, the failure to file a duplicate of the articles of association with the secretary of state, an incorrect statement of the length of the road, and omission of the statement of the principal place of business, and many other irregularities of the kind mentioned in Spring Valley Water Works v. San Francisco, 22 Cal. 440, the insufficient acknowledgment of the articles of incorporation (Dannebroge Mining Company v. Allment, 26 Id. 286), are irregularities that will not defeat the corporation when its organization is collaterally called in question. A substantial compliance with the requirements of the statute will be sufficient to show a corporation *de jure* in an action between the corporation and a private person."

is necessary. The fact of incorporation is, then, an inference of law.[1] Proof of the fact of corporation may be made by evidence of the charter or general act, or by organization and user.[2]

§ 376. **Contracts Made for, but not in Name of Corporation, how Alleged.**—A corporation is recognized in law by its corporate name, and must sue and be sued by such name, under which it transacts its business.[3] The directors of a corporation are its chosen representatives, and constitute the corporation for all purposes of dealing with others. What they do as the representatives of the corporation, the corporation itself is deemed to do; and the manifested motives and intentions of such directors, when a material fact is in issue, are to be imputed to the corporation.[4] As a corporation can contract only through the instrumentality of its chosen representatives, it follows that a corporation is the proper party plaintiff in an action founded on a contract made for its benefit, and the misnomer of a corporation in a grant, obligation, or other written contract does not prevent a recovery thereon by or against the corporation in its true name, provided its identity is sufficiently averred and proved.[5] Thus a contract not under seal, signed by the agents of a corporation, and showing upon its face that the agents intended to contract for the corporation, and not for themselves, may be declared upon as the contract of the corporation;[6] and where a deed is made to a corporation, by a name varying from its true name, it may sue in its true name, and aver that the defendants made the deed to them by the name mentioned in the deed; and an allegation that the defendants acknowledged themselves to be bound unto the plaintiffs by the description of, etc., is equivalent to such an averment.[7] So, also, an obligation given to the corporation, which is, in terms, payable to its agents or directors, is properly described in declaring on it, as given to the corporation, by the name and description of the directors, etc.[8] In California, in an action on a

[1] Falconer v. Campbell, 2 McLean, 195.

[2] Waterville Manf. Co. v. Bryan, 14 Barb. 182; Stoddard v. Onondaga Annual Conference, 12 Id. 573.

[3] Curtiss v. Murry, 26 Cal. 633; King v. Randlett, 35 Id. 318; Bundy v. Birdsall, 29 Barb. 31.

[4] Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48.

[5] Melledge v. Boston Iron Co., 5 Cush. 158, 176; Minot v. Curtis, 7 Mass. 444; Medway Cotton Manuf. Co. v. Adams, 10 Mass. 360; Commercial B'k v. French, 21 Pick. 486; Lowell v. Morse, 1 Met. 473; Charitable Association v. Baldwin, 1 Met. 359.

[6] Many v. Beckman Iron Co., 9 Paige Ch. 188.

[7] N. Y. African Society v. Varick, 13 Johns. 38.

[8] Bayley v. Onondaga Ins. Co., 6 Hill. 476.

note executed by the defendant, payable to the "board of trustees of the Sonoma Academy, or their successors in office," and which specified that "no change in the name, character, or management of the said academy" should affect the liability of the payor, the complaint of the "Cumberland College" was held sufficient, which stated that the plaintiff was a corporation, and the same institution of learning formerly known as the "Sonoma Academy," that the academy was, after its establishment, changed to "Cumberland College," and that the note was the property of the plaintiff.[1] Upon the same principle, in an *assumpsit* against a bank, an averment that the defendant "promised through its president and cashier," without alleging their authority, is sufficient, as the bank could not have promised except through its agents duly authorized.[2] At the common law, the officers of a corporation are not liable personally on a promissory note of the corporation,[3] and are not proper parties defendant to an action on a mere money demand against the corporation, except where statutes authorize suits against them.[4] In certain actions of an equitable character, where the members of a corporation are authorized to bring an action on behalf of the corporation, the complaint must allege that the officers whose duty it is to sue have been requested to institute proceedings for that purpose, and have refused to do so.[5] Where an obligation is executed to two corporations jointly, they may sue thereon jointly.[6]

§ 377. **Actions by Individual Banker.**—In New York, an individual banker commencing and carrying on business under the general banking act of that state, and the acts amending the same, is a corporation sole; and as such he may assume a corporate name, as well as may an association of several persons. An action by such banker upon a cause of action accruing to him as such, is properly brought in the corporate name.[7]

§ 378. **Corporation's Liability for Libel, Slander, and Malicious Prosecution.**—In California it is held that a corporation has the power to compose and publish a libel, and by reason thereof, when done, becomes liable to an action for damages by the person of and concerning whom the words are com-

[1] Cumberland College v. Ish, 22 Cal. 641.

[2] Bank of Metropolis v. Guttschlick, 14 Pet. 19.

[3] Hall v. Crandall, 29 Cal. 567.

[4] Brahe v. Pythagoras Association, 4 Duer, 658.

[5] Vanderbilt v. Garrison, 8 Abb. Pr. 361; House v. Cooper, 16 How. Pr. 292; 3 Pomeroy's Eq. Jur., sec. 1095.

[6] Gathwright v. Calloway Co., 10 Mo. 663.

[7] Bank of Havana v. Wickham, 7 Abb. Pr. 134; Hallett v. Harrower, 33 Barb. 537

posed and published.[1] And on the same principle, in an action for a libel published by a corporation, acting through its directors in the discharge of their office, the malice of the directors is the malice of the corporation.[2] Conversely a corporation may maintain an action for libel on it as such, for words affecting its business or property, if special damages be alleged and proved.[3] In Missouri, however, it has been held, that an action for malicious prosecution, slander, false imprisonment, or assault and battery, can not be maintained against a corporation aggregate, but must be brought against the individuals implicated personally.[4]

§ 379. **Corporate Existence when Commences.**—Under the general laws, and by statute, the word "person," in its legal signification, is intended to include artificial as well as natural persons.[5] Under the laws of California, corporations have a legal existence from the date of filing the certificate of incorporation in the office of the county clerk.[6]

§ 380. **Verification by a Corporation.** — When a corporation is a party, the verification of the pleading may be made by any officer thereof;[7] and in some states by an agent or attorney thereof.[8] And this includes municipal as well as private corporations.[9]

§ 381. **Allegation of Residence.** — In New York, in an action against a foreign corporation brought in the supreme court of the city New York, where the complaint states a cause of action of which the court has jurisdiction, it is unnecessary to aver that the plaintiff resides within the city of New York;[10] or that the defendants transact their business or keep an office within the city.[11]

§ 382. **Against Corporation Formed under the Act in Relation to Roads and Highways.**

Form No. 77.

[TITLE.]

The plaintiff complains, and alleges:

[1] Maynard v. F. F. Ins. Co., 34 Cal. 48.

[2] Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48; Philadelphia etc. R. R. Co. v. Quigley, 21 How. (U. S.) 204.

[3] Shoe & Leather Bank v. Thompson, 18 Abb. Pr. 418.

[4] Childs v. Bank of Missouri, 17 Mo 213.

[5] Douglas v. P. M. S. S. Co., 4 Cal. 304; Cal. Code of Proc., sec. 17.

[6] Mokelumne Hill Min. Co. v. Woodbury, 14 Cal. 424; Cal. Civil Code, sec. 296.

[7] California Code of Proc., sec. 446; N. Y. Code, sec. 157; Ariz. Code of Proc., sec. 55; Idaho, sec. 55; *ante*.

[8] Oregon Code, sec. 348; Or. Decis. 79.

[9] Hixon v. George, 18 Kans 253.

[10] Spencer v. Rogers Locomotive Works, 17 Abb. Pr. 110; S. C., 8 Bosw. 612.

[11] Corn Exchange Bank v. Western Transportation Co., 15 Abb Pr. 319, note; Koenig v. Nott, 2 Hilt. 323; S. C., 8 Abb. Pr. 384.

I. That the defendant is a corporation created by and under the laws of this state, organized pursuant to an act of the legislature entitled [title of action in full], passed ....., 18..., and the acts amendatory thereof and supplementary thereto.

II. [State a cause of action].[1]

[DEMAND OF JUDGMENT.]

§ 383. **Liability of Directors of Turnpike Company.**— In California, the directors of a corporation formed for the construction of plank or turnpike roads are not personally liable under the act creating such corporations, on a contract made by them, which, by its terms, binds the corporation, unless the stockholders have adopted by-laws, and the same have been filed in the recorder's office, and the contract is made in violation of the by-laws.[2]

§ 384. **By Corporation on Stock Assessments.**

Form No. 78.

[TITLE.]

The plaintiff complains, and alleges:

I. That in pursuance of an act of the legislature of the state of California, entitled "an act" [give the title of the act], passed ....., 18..., and of the acts amendatory thereof and supplementary thereto, the above-named company was organized and formed into a corporation under the name of the ..... Company, and ever since its said organization has had its principal office and place of business at the city of .....

II. That on the ..... day of ....., 18.., at ....., defendant and certain other persons, being desirous of associating themselves together for the purpose of constructing a toll road [or state the actual purpose] from the village of R. to the village of S. in said county, in consideration thereof and of the mutual promises each to the other and of the benefits to be derived from being members of said association, made and subscribed a certain agreement in writing, as follows, to wit:

[Copy subscription paper, with subscribers' names, and add]: and other persons whose names are here omitted.

III. That the said defendant did, at the time of subscribing said agreement, set opposite to his name thereto subscribed the number of ten shares, and that the par value of each share is fifty dollars, and that said defendant agreed to take and pay for the same.

[1] The sufficiency of this form has been upheld in Oswego and Syracuse Plank Road Co. v. Rust, 5 How. Pr. 390; N. Y. Floating Derrick Co. v. N. J. Oil Co., 3 Duer, 648.

[2] Hall v. Crandall, 29 Cal. 568.

IV. That afterwards, to wit, on the ..... day of ....., 18..., at a regular meeting of the trustees of said company, an assessment of five per cent of the par value of each share of the capital stock of the said corporation was duly levied; that at the time of the levy of such assessment, defendant was a subscriber to the capital stock of said corporation in the amount of ..... shares, of the par value of ..... dollars, and was the owner of such stock.

V. That afterwards, etc. [Allege the number of assessments defendant has failed to pay, each as above.]

VI. That the defendant had due notice of each of the said assessments, made by the trustees of said company as aforesaid, and that the same were duly published in the daily ... ., a newspaper printed and published in the city of ....., for at least ..... days, and in every respect according to law.

VII. That the whole sum of ..... dollars is now due plaintiff from defendant thereon, and no part thereof has been paid.

[Demand of Judgment.]

§ 385. **Stockholder's Liability for Assessments, how Enforced.**—The liability of a stockholder for a valid assessment may be enforced by an action at law, upon his promise, express or implied, to pay the same, although the corporation is authorized to sell the delinquent shares of its stockholders for non-payment of assessments. The remedy of sale given to the corporation, under such circumstances, is merely cumulative, and may be waived by the corporation.[1] In some of the states, however, the remedy, in the first instance, is by a sale of the stock. It is so held in Massachusetts,[2] in New Hamp-

[1] Salem & Tenn. R. R. Co. v. Tipton, 5 Ala. 787; S. C., 39 Am. Dec. 341; Worcester Turnp. Co. v. Willard, 5 Mass. 80; S. C., 4 Am. Dec. 39; Instone v. Frankfort Bridge Co., 2 Bibb, 576; S. C., 5 Am. Dec. 638; Taunton Turnp. Co. v. Whiting, 10 Mass. 327; S. C., 6 Am. Dec. 124; Gahan etc. Turnp. Road v. Hurtin, 9 Johns. 217; S. C., 6 Am. Dec. 273; Conn. etc. R. R. Co. v. Bailey, 24 Vt. 465; Troy etc. R. R. Co. v. Ker, 17 Barb. 581; Northern R. R. Co. v. Miller, 10 Id. 260; East. Plank R. Co. v. Vaughan, 20 Id. 155; Spear v. Crawford, 14 Wend. 20; Troy etc. R. R. Co. v. McChesney, 21 Id. 296; Dayton v. Borst, 31 N. Y. 435; Carlisle v. Cahawba etc. R. R. Co., 4 Ala. 70; Rockville etc. Road v. Maxwell, 2 Cranch C. C. 451; Del. etc. Canal Co. v. Sansom, 1 Binn. 70; Kirksey v. Florida etc. Road Co., 7 Fla. 23; Inglis v. Great N. R'y Co., 1 Macq 112; South Bay etc. Co. v. Gray, 30 Me. 547; Mann v. Cooke, 20 Conn. 178; Raymond v. Caton, 24 Ill. 123; City Hotel v. Dickinson, 6 Gray, 586. That the justices' courts in California have jurisdiction over actions to collect unpaid assessments, the liability therefore being founded on contract, see Alpers v. Superior Court, 3 West Coast Rep. —.

[2] Boston etc. R. R. Co. v. Wellington, 113 Mass. 79; City Hotel v. Dickinson, 6 Gray, 586; New Bedford etc. Co. v. Adams, 8 Mass. 138.

shire,[1] and in Maine.[2] In California it has been decided in a recent case, that the stockholders of mining corporations organized under the laws of California incur no liability *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payments of the debts of the company, the nominal par value of their shares; that unless stockholders of a corporation have subscribed for stock, or are the successors of subscribers, assessments levied on their stock can be enforced only by the sale of their shares, and that the provisions of the code, defining the personal liability of stockholders, only apply where, from the terms of the stockholder's subscription, such liability was incurred.[3] In such state also, it has been recently held that corporations organized and existing under the provisions of the code have authority to levy and collect assessments on stock for which the subscription price has been fully paid.[4]

§ 386. **Averment of Assessments, how Made.**—In an action to collect an assessment, the complaint must aver a proper assessment, and state how it was ordered, so as to make it conform to the charter and by-laws, or general act under which the corporation was organized.[5] In Pennsylvania, an averment that the assessment was duly made is a sufficient allegation to show that they conformed to the statute.[6] In Ohio however, where the statute provided for a thirty-days notice of the time and place, an averment that the defendant was called upon and duly notified by publication was held insufficient, as being too general.[7] And in this latter state, in proceeding under the provisions of the revised statutes, an allegation is necessary that the directors required subscriptions to be paid in installments of a certain amount at a certain time.[8] Where a corporation becomes insolvent, and ceases to act under its charter, so that the prescribed mode of making assessments can not be complied with, the debt will be considered as due without further demand.[9] But in an action brought by the receiver of an

[1] N. H. Cent. R. R. Co. v. Johnson, 30 N. H. 390; Piscataqua Ferry Co. v. Jones, 39 Id. 491; White Mts. R. R. Co. v. Eastman, 34 Id. 124.

[2] Kennebec etc. R. R. Co. v. Kendall, 31 Me. 470; Kennebec etc. R. R. Co. v. Jarvis 34 Id. 360.

[3] In re South Mt. Con. M. Co., 7 Saw. 30.

[4] Santa Cruz R. R. Co. v. Spreckels, 2 West Coast Rep. 752, 833.

[5] Gibbart v. Junction R. R., 12 Ind. 484; Atlantic etc. Ins. Co. v. Young, 38 N. H. 451.

[6] Bavington v. Pittsburgh etc. R. R., 34 Pa. St. 358.

[7] Penn. & O. Canal Co. v. Webb, 9 Ohio, 136.

[8] M. C. & L. M. R. R. v. Hall, 26 Ohio St. 310; Devendorf v. Beardsley, 23 Barb. 656; Williams v. Babcock, 20 Id. 109; Hurlbut v. Root, 12 How. Pr. 511; Williams v. Lakey, 15 Id. 206.

[9] Henry v. V. & A. R. R., 17 Ohio 187.

insolvent corporation, to recover on a stock subscription, which provided that after twenty per cent had been paid, the balance should be subject to the call of the directors, as they may be instructed by a majority of the stockholders, the complaint must show, by alleging losses or otherwise, the necessity for an assessment, and a call made on the stockholders.[1]

§ 387. **By a Corporation, on a Stock Subscription.**

Form No 79.

[TITLE.]

The plaintiff complains and alleges:

I. [Aver incorporation, as in No. 78.]

II. That in contemplation of the incorporation of these plaintiffs, and for the purpose of constructing, owning, and maintaining the [toll road], then contemplated, the defendant, with others, on the ..... day of ....., 18..., at ....., became a subscriber to the stock of the said company by [severally] signing and delivering an agreement in writing, of which the following is a copy: [Copy subscription paper.]

III. That, among other persons, the defendant signed and executed said agreement, and set opposite to his name the sum of ..... dollars, which he thereby agreed to pay to said company.

IV. That after the defendant had thus subscribed, and on or about the ..... day of ....., 18...., he subscribed to the articles of association of said company his name and his place of residence, to wit, ..., and the number of shares of stock taken by him, to wit, ... shares, amounting to ..... dollars, the shares of stock being ..... dollars each.

V. That the plaintiff, by its directors, on the ..... day of ....., 18...., at ....., tendered to the defendant the shares of stock, so subscribed for by him, and demanded the defendant to pay thereon the sum of ....., agreeably to said subscription and the charter and by-laws of the company.

VI. That the plaintiff has performed all the conditions thereof on its part.

VII. That the defendant has not paid the said subscription, or any part thereof.

[DEMAND OF JUDGMENT.]

§ 388. **Averments in Actions on Stock Subscription.**— A complaint on a subscription to be paid as assessed must aver a proper assessment.[2] Where the general law or charter under

[1] Chandler v. Keith, 42 Iowa, 99.

[2] Gebhart v. Junction R. R. Co., 12 Ind. 484. For a form of complaint under the statutes of New York, see Poughkeepsie Plank Road Co. v. Griffin, 21 Barb. 454; Oswego & Syr. Plk.

which the corporation was organized requires the whole or a certain part of the stock to be subscribed before the corporation can act, a complaint to collect an individual subscription must allege that such conditions have been complied with.[1] If there has been a different agreement between the subscribers, this rule does not apply.[2] In Ohio it has been held sufficient to aver the due election of directors, as that implies that the requisite amount of stock has been subscribed.[3] Where the subscription was conditional, an allegation of the performance of the condition is essential. Under the code, it would seem that an allegation that the plaintiff had performed all the conditions on his part, is sufficient.[4] If the action is to recover the entire amount of the subscription, the complaint should allege a tender of the stock, or a readiness and willingness on the part of the corporation to deliver it to the defendant, where such acts are not conditions precedent.[5] In conformity with the practice of some of the states, the complaint must contain a copy of the subscription paper.[6] The company may assign its r ght to recover subscriptions,[7] but in such case the complaint, in an action by the assignee, must aver the assignment.[8]

§ 389. **Separate Subscriptions.**—Where a defendant subscribed in his own name for fifty shares of railroad stock, and at the same time subscribed for fifty more, signing his own name again, adding thereto the letters "Exr.," to indicate that he took the additional fifty shares for an estate for which he was executor, it was held that these were separate contracts, upon which separate actions would lie, and that the pendency of an action to enforce payment of the first subscription formed no sufficient ground for abating the action to enforce the second subscription.[9] And where one guarantees the payment of

Rd. Co. v Rust, 5 How. Pr. 390; Dutchess Cotton Mfg. Co. v. Davis, 14 Johns. 238; First Baptist Soc. v. Rapelee, 16 Wend. 605; Buffalo etc. R. R. Co. v. Cary, 26 N. Y. 75; Welland Canal Co. v. Hathaway, 8 Wend. 480; S. C., 24 Am. Dec. 51, note 58;

[1] Jewett v. Railway, 34 Ohio St. 601; Topeka Bridge Co. v. Cummings, 3 Kan. 55; Fry v. Lexington etc. R. R., 2 Met. (Ky.) 314; Livesey v. Omaha Hotel, 5 Neb. 50.

[2] Emmitt v. Railroad Co., 31 Ohio St. 23; Lail v. Mt. Sterling Coal Co., 13 Bush, 32.

[3] Ashtabula etc. R. R. v. Smith, 15 Ohio St. 328.

[4] Trott v. Sarchett, 10 Ohio St. 241; Cal. Code of Proc., sec. 457; Ohio R. S., sec. 5091.

[5] St. Paul etc. R'y Co. v. Robbins, 23 Minn. 439; James v. C. H. & D. R. R., 2 Disney, 261; Minneapolis Harvester Works v. Libby, 24 Minn. 327.

[6] Hudson v. Plank Road Co., 4 G. Greene, 152; Stockton v. Creager, 51 Ind. 262; but see Van Riper v. American Cent. Ins. Co., 60 Id. 123

[7] Downie v. Hoover, 12 Wis. 174; James v. C. H. & D. R. R., 2 Disney, 261; Trott v. Sarchett, 10 Ohio St. 241; M. & C. R. R. v. Elliott, Id. 57.

[8] Minneapolis Harvester Works v. Libby, 24 Minn. 327.

[9] Erie & N. Y. City R. R. Co. v. Patrick, 2 Keyes, 266.

a subscription, the subscriber and the guarantor may be sued in the same action.[1] A release of the guarantor, however, will not discharge the subscriber, as their liabilities are several.[2]

§ 390. **Actions by Religious Corporations.**—Religious corporations may sue for subscription.[3] Trustees of such corporations must first establish their right, before they can use the corporate name.[4] Before the court can take notice of the regulations of particular religious denominations, or their nature or effect, their existence should be properly averred and proved as matter of fact.[5]

§ 391. **On a Subscription to the Expense of a Public Object.**

Form No. 80.

[Title.]

The plaintiff complains and alleges:

I. [Aver incorporation.]

II. That the plaintiff, in the month of....., 18.., was erecting a building at....., for the purposes of public worship.

III. That the defendants and others requested the plaintiff to complete the same, and for the purpose of enabling the plaintiff to do so, they subscribed and agreed to pay to the plaintiff the sum of ..... dollars, in consideration of the premises, and of the like subscription and agreement of other persons.

IV. That upon the faith of said subscription the plaintiff proceeded with the erection of the building, and expended thereon large sums of money, and incurred large liabilities, and completed said building, and otherwise duly performed all the conditions on its part.

V. That the defendant has not paid said subscription, or any part thereof [except, etc.]

[Demand of Judgment.][6]

§ 392. **Consideration for Subscription.**—The general rule is settled by a weight of authority, although there are many cases

[1] Neil v. Trustees, 31 Ohio St. 15.

[2] Deming v. Trustee, 31 Ohio St.

[3] Dansville Seminary v. Welch, 38 Barb. 221.

[4] North Baptist Church v. Parker, 36 Barb. 171.

[5] Youngs v. Ransom, 31 Barb. 49. As to what parties can maintain an action against a defendant, treasurer of a religious corporation, for money received by him as subscriptions and donations for an enterprise not immediately connected with the church corporation, see Rector, etc., of the Church of the Redeemer v. Crawford, 5 Rob. 100.

[6] The sufficiency of this form is sustained in Richmondville Union Sem. v. Brownell, 37 Barb. 535; Wayne etc. Institute v. Smith, 36 Id 576; Ohio Wesleyan Female College v. Higgins, Ex'r etc., 16 Ohio St. 20.

which seems to hold the contrary doctrine, that merely signing a subscription paper which has been signed by others, for the purp se of raising funds for the accomplishment of a public object, is not sufficient to render a subscriber liable. The reason of this rule is the want of consideration for the promise. If, however, the subscription paper contains a request to those who represent the object for which the subscription is made to do an act, or incur any expense, or submit to any inconvenience, and on the strength thereof such act is done, and expense or inconvenience incurred, this request and performance have uniformly been held to be a sufficient consideration to support the promise made in the subscription paper.[1]

§ 393. **Actions to Recover Subscriptions, by Whom should be Brought.**—An action for money due a church on a verbal contract with the trustees should be brought in the name of the corporation, and not in the name of the trustees.[2]

§ 394. **Against a Municipal Corporation.**

Form No. 81.

[TITLE.]

A. B., Plaintiff,
against
THE COUNTY OF ....., Defendant.

The plaintiff complains and alleges:

I. That the defendant is a municipal corporation, created by the laws of this state.

II. [State cause of action.]

III. That on the ..... day of ....., at ....., the plaintiff presented in writing the claim or demand hereinbefore set forth to the board of supervisors of the county of .....,

[1] Farmington Academy v. Allen, 14 Mass. 172; S. C., 7 Am. Dec. 201; Phillips' Limerick Academy v. Davis, 11 Mass. 113; S. C. 6 Am. Dec. 162; Trustees v. Garvey, 53 Ill. 401; Bridgewater Academy v. Gilbert, 2 Pick. 579 S. C., 13 Am. Dec. 457, and note; McClure v. Wilson, 43 Ill. 356; Philamath College v. Hartless, 6 Or. 158; Trustees v. Stewart, 1 N. Y. 581; Howard v. Williams, 2 Pick. 80; Barnes v. Perine, 12 N. Y. 18; Trustees v. Garvey, 53 Ill. 401; McAuley v. Billinger, 20 Johns 89; Thompson v. Mercer M. Co., 40 Ill. 379; Ohio Wes. Female College v. Love, 16 Ohio St. 20; Troy Academy v. Nelson, 24 Vt. 189; Gittings v. Mayhew, 6 Md. 113; Phipps v. Jones, 20 Pa. St. 260; Wilson v. Baptist Ed. Soc., 10 Barb. 309; Galt's Ex'r v. Swain, 9 Gratt. 638; L'Amoreux v. Gould, 3 Seld. 349; Foxcroft Academy v. Favor, 4 Greenl. 382. In New Hampshire, however, the mutual promises of the subscribers are held to be a sufficient consideration: George v. Harris, 4 N. H. 533; Society v. Perry, 6 Id. 164; Society v. Goddard, 7 Id. 485; and the same doctrine is held in California: Christian College v. Hendley, 49 Cal. 347. In this last case it was held that if subscriptions in aid of a college are made to a finance committee, and pass by operation of law to a corporation afterwards formed, the complaint in an action by the corporation to recover a subscription should aver that fact.

[2] Barnes v. Perine, 9 Barb. 202; Leftwick v. Thornton, 18 Iowa, 56.

for allowance, and that they failed and refused to allow the same or any part thereof.

IV. That a copy of said claim as presented to the said board of supervisors is hereunto attached and made a part of this complaint.

V. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.]

§ 395. Against a County for Temporarily Guarding Jail.

Form No. 82.

[TITLE OF COURT AND CAUSE.]

The plaintiff complains, and alleges:

I. [Allege defendant's corporate existence.]

II. That the plaintiff performed services for the said defendant in guarding the jail of said county, from the ..... day of ....., 18..., to and including the ..... day of ....., 18.....

III. That the sheriff, with the assent, in writing, of the superior judge of said county, employed plaintiff to perform said service as a temporary guard for the protection of the county jail, and for the safe keeping of prisoners, and that said employment was necessary.

IV. That said sheriff at the time of employing said plaintiff promised plaintiff that the defendant would pay plaintiff for said services what they were reasonably worth, and that said services were reasonably worth the sum of ..... dollars.

V. [Allege presentation, rejection, and non-payment of claim as in preceding form.]

VI. [If there are other claims for similar services, performed at different dates, allege them as separate causes of action.]

[DEMAND FOR JUDGMENT.]

§ 396. By a County.

Form No. 83.

[TITLE.]

THE COUNTY OF ....
Plaintiff,
against
A. B., Defendant.

The plaintiff, a corporation existing by [or under] the laws of this state, complains and alleges:

I. [State cause of action.]

[DEMAND OF JUDGMENT.]

§ 397. **Corporate Character must be Alleged.**—It is an indispensable allegation, in an action brought by a corporation,

[1] The foregoing form is founded on section 1610 of the California Penal Code, and is sustained in Hughes v. Mendocino County, 3 West Coast Rep. 201.

that it is a corporation, and it results from the logic of pleading that the opposite party may deny the allegation.[1] In an action to charge a defendant as a municipal corporation, in Iowa, it is sufficient to aver that the defendant is a city; and the same allegation has been held adequate in Ohio.[2] Where municipal corporations are divided into certain classes, in proportion to population, and it is sought to charge a defendant as belonging to one of such classes, an averment to that effect is necessary.[3] And a complaint against a municipal corporation existing under a new charter and name, for work and labor done for the same town under a former charter and name, must aver that the new incorporation is liable for the debts of the old.[4]

§ 398. **Parties to Actions against Municipal Corporations.**—In actions by or against municipal corporations, towns, counties, public boards, and other official bodies, who are the proper parties to bring the action, or against whom it should be brought, depends largely upon the local laws of each state, to which laws and the decisions thereunder reference must be had for the determination of the proper form of action. In California counties are corporations, but not the people thereof, and as such are required to sue or to be sued in the name of the county.[5] Thus an action on a recognizance given in a criminal case should be brought in the name of the county.[6] So, also, in an action for the recovery of money from a default-

[1] Oroville etc. R. R. Co. v. Plumas County, 37 Cal. 354. A substantial compliance with the requirements of the statute will be sufficient to show a corporation *de jure*, in an action between it and a private person: Id. For forms of complaints under the New York practice, in actions by or against towns, counties, supervisors, and other similar public bodies, see Carman v. Mayor, 14 Abb. Pr. 301; Doolittle v. Supervisors, 18 N. Y. 155; Roosevelt v. Draper, 23 Id. 318; Hathaway v. Town of Cincinnatus, 62 Id. 434; Town of Lewis v. Marshall, 56 Id. 668; Town of Guilford v. Cooley, 58 Id. 116; Town of Chautauqua v. Gifford, 8 Hun, 152; Sutherland v. Carr, 85 N. Y. 105; Hagadorn v. Raux, 72 Id. 583; in Wisconsin, Cairns v. O'Bleness, 40 Wis. 469; Beaver Dam v. Frings, 17 Id. 398; Supervisors v. Kirby, 25 Id. 498; Dutcher v. Dutcher, 29 Id. 651; Town of Pine Valley v. Town of Unity 40 Id. 682; La Crosse v. Melrose, 22 Id. 459; School Directors v. Coe, 40 Id 103; Supervisors v. Hall, 42 Id. 59; in Missouri, Lafayette Co. v. Hixon, 69 Mo. 581; in Indiana, Vanarsdale v. State, 65 Ind. 176; Garner v. Kent, 70 Id. 428; in Montana, Comm'rs v. Lineberg, 3 Mont. 31.

[2] Stier v. Oskaloosa, 41 Iowa, 353; Mitchell v. Treasurer of Franklin Co., 25 Ohio St. 143.

[3] Bolton v. Cleveland, 35 Ohio St. 319; the contrary is held in Indiana, where such fact is judicially noticed as a matter of history: Stultz v. State, 65 Ind. 492.

[4] Lyle v. Common Council of Alexandria, 1 Cranch C. C. 473; Clearwater v. Meredith, 1 Wall. 25.

[5] Cal. Pol. Code, secs. 4000–4003; Price v. Sacramento Co., 6 Cal. 254; People ex rel. Hunt v. Supervisors, 28 Id. 431; Smith v. Meyers, 15 Id. 33; Placer Co. v. Astin, 8 Id. 305. And the same is true in Nevada: Waitz v. Ormsby Co., 1 Nev. 370.

[6] Mendocino Co. v. Lamar, 30 Cal. 627.

ing treasurer;[1] or to recover money belonging to the general county fund.[2] So an action may be maintained in the name of the county to recover upon a note payable to the county, to the use of the state school fund.[3] For similar reasons the county is the proper party plaintiff to object to a contract made by the board of supervisors for building a jail;[4] or to conduct proceedings by *mandamus* against county officials.[5] So, also, boards of supervisors can not be sued in their official character, in ordinary common-law actions, for claims against the public, county, or village, without express statutory provision.[6] And in an action to enjoin a board of supervisors, when it consists of three members, at least two must be joined as defendants.[7] But an action to abate a nuisance caused by the obstruction of a public highway must be brought in the name of the road overseer, and not in the name of the county.[8] In California, actions against counties may be commenced and tried in any county in the judicial district in which such county is situated, unless such actions are between counties, in which case they may be commenced and tried in any county not a party thereto.[9]

§ 399. **Averment of Demand and Presentation of Claim.**—Whenever it is provided by statute that in order to render liable a municipal corporation the plaintiff's demand or claim must be presented to a certain board or official for allowance, the complaint must contain an allegation of the facts constituting such presentation, and aver the rejection of the demand or claim.[10] Unless such facts are alleged, the presentation can not be proved.[11] In California it is provided by statute that "the board of supervisors must not hear or consider any claim in favor of an individual against the county, unless an account properly made out, giving all the items of the claim, duly verified as to its correctness, and that the amount claimed

[1] Mendocino Co. v. Morris, 32 Cal. 145.

[2] Solano Co. v. Neville, 27 Cal. 468; Sharp v. Contra Costa Co., 34 Id. 284.

[3] Barry Co. v. McGlothlin, 19 Mo. 307.

[4] Smith v. Myers, 15 Cal. 33.

[5] Calaveras Co. v. Brockway, 30 Cal. 325. In New York, actions against counties should be brought against the supervisors as an official board, and not against them individually: Wild v. Supervisors, 9 How. Pr. 315; People v. Supervisors, 24 Id. 119.

[6] Hastings v. San Francisco, 18 Cal. 49.

[7] Trinity Co. v. McCammon, 25 Cal. 119.

[8] San Benito Co. v. Whitesides, 51 Cal. 416.

[9] Cal. Code of Proc., sec. 394.

[10] Ernst v. Kunkle, 5 Ohio St. 523; Russell v. Mayor, 1 Daly, 263; Ellissen v. Halleck, 6 Cal. 386; McCann v. Sierra County, 7 Id. 123.

[11] City of Atchison v. King, 9 Kan. 550. But see Jaquish v. Town of Ithaca, 36 Wis. 108, where it is held that the failure to make such allegations must be taken advantage of by the defendant, either by motion for nonsuit or otherwise.

is justly due, is presented to the board within a year after the last item of the account accrued."[1] In the construction of this statute it has been held that a substantial compliance therewith is essential to render the county liable after the rejection of the claim;[2] and that the plaintiff must aver all the facts required by the statute in relation to the presentation of his claim, and its rejection by the board of supervisors. Merely averring that the claim has been duly presented and rejected is not enough.[3] Where, however, a board of supervisors entered into a contract for the erection of a county jail, the work to be paid for in installments, on the certificate of the architect, an account giving the sum total of an installment, without "all the items of a claim," is sufficient.[4] The necessity of presentation of a claim is not confined to causes of action arising out of contract, but includes cases arising from torts,[5] and a money judgment.[6] Unless a claim is presented within the time limited, it is barred, and the supervisors have no power to allow it afterwards;[7] nor has the legislature power to legalize an illegal claim, so as to make it binding on the county.[8] After the final action of the board in rejecting a claim, the plaintiff must bring action thereon within six months, or his demand is barred.[9]

§ 400. **Instances of Necessary Allegations in Actions by or against Municipal Corporations—Authority to Enact By-laws.** — The authority to enact may be averred in general terms. Where a corporation is authorized to pass a by-law if they find it necessary, and they pass it, a declaration on the by-law need not aver the necessity.[10] It is sufficient in pleading to aver generally, that a contract sought to be enforced is in

[1] California Pol. Code, sec. 4072.

[2] Babcock v. Goodrich, 47 Cal. 488.

[3] Rhoda v. Alameda Co., 52 Cal. 350

[4] Babcock v. Goodrich, 47 Cal. 488.

[5] Price v. County of Sacramento, 6 Cal. 254; McCann v. Sierra County, 7 Id. 121.

[6] Alden v. County of Alameda, 43 Cal 270.

[7] Carroll v. Siebenthaler, 37 Cal. 193.

[8] Domingos v. County of Sacramento, 51 Cal. 603.

[9] California Political Code, sec. 4075. No action can be maintained against the City of New York till such claim has been presented to the comptroller: Laws of N. Y., 1860, c. 379, sec. 2; Russell v. Mayor of N. Y; 1 Daly, 263 For somewhat similar statutes as to the necessary demand before a suit against the cities of Brooklyn and Buffalo respectively, see Howell v. City of Buffalo, 15 N. Y. 512; Hart v. City of Brooklyn, 36 Barb. 226. In New York, a second demand on the expiration of twenty days after the rejection of the claim is required, and under that practice the following allegation is essential: That thereafter, on, etc., and after the expiration of twenty days, he made a second demand in writing, upon the said ....., for the adjustment of the said claim; but the said ..... has hitherto wholly neglected and refused to make an adjustment or payment thereof: See Arb. Forms, No. 184, and authorities there cited.

[10] Stuyvesant v Mayor etc. of New York, 7 Cow. 585.

violation of some municipal ordinance or enactment. When such ordinance or enactment is founded upon a statute, it is not necessary to plead the statute specially.[1]

§ 401. **Actions on Bonds and Contracts.**—In a suit against a municipal corporation on its bonds, where the complaint sets out the bonds; avers the defendant to be a corporation; that the corporation made and delivered the bonds on good consideration, under an ordinance passed by the proper agents of the corporation, having authority for that purpose, and that defendant has failed to pay; it was held that the complaint shows *prima facie*, a liability on the part of the corporation; and it was not necessary to set out the ordinance, nor the vote, or other proceedings of the corporate agents, or give any further description of the agents of the corporation.[2]

Where a suit is brought on a contract made by a city, where the laws regulating it require the consent of two-thirds of its electors to validate debts for the borrowed money, such consent need not be averred on the plaintiff's part. If with such sanction the debt would be obligatory, the sanction will, primarily, be presumed. Its non-existence, if it does not exist, is matter of defense, to be shown by the defendant.[3] In an action against the city of St. Paul, on a contract for grading streets, it is not necessary to allege that an estimate of the expenses was filed by the commissioner, nor that the contract was made with the lowest bidder.[4]

In California, a complaint which alleges that the plaintiff, as a justice of the peace, performed services at the request of the district attorney for the county, in cases wherein the people of the state were plaintiffs, to the amount of thirty-two hundred dollars, and that defendant thereby became and is liable to pay the said sum, does not state facts sufficient to constitute a cause of action against said county.[5] A complaint in an action against a county for damages sustained by the location of a public highway over plaintiff's land, laid out under the act of 1861, fails to state a cause of action unless it avers that the plaintiff had attempted to come to an agreement with the board of supervisors as to the amount of damages sustained, and could not agree with the board as to such amount.[6]

§ 402. **Actions for Medical Care of Sick.**—A complaint

[1] Beman v. Tugnot, 5 Sandf. 153.
[2] Underhill v. Trustees of the City of Sonoma, 17 Cal. 172.
[3] Gelpoke v. City of Dubuque, 1 Wall. U. S. 221.
[4] Nash v. St. Paul, 8 Minn. 172.
[5] Miner v. Solano County, 26 Cal. 115.
[6] Lincoln v. Colusa County, 28 Cal. 662.

in an action against a county to recover for medical care and treatment of sick persons fails to state a cause of action if it do not aver that the sick persons treated were indigent persons and residents of the county.[1]

When in an action against a corporation for the value of medical services rendered its employees, the petition did not allege any promise by the defendant, or any fact by which the law would imply a promise, it was held defective. An allegation that the services were rendered at the instance and request of the agent of the defendant is not an averment that they were rendered at the instance and request of the defendant.[2]

§ 403. **Action for Injury by Negligence.**—The person or persons upon whom the law may impose the duty either to repair a defect or to guard the public from an excavation, embankment, or grading, and also the officer or officers through whose official neglect such defect continues, are jointly and severally liable for injuries occasioned by their negligence.[3] Incorporated cities are not liable, in California, for injuries sustained by private individuals caused by the neglect of the city officers in keeping its streets in repair, unless made so liable by the acts under which they are incorporated;[4] nor for personal injuries caused by the acts of its officers at a public hospital;[5] nor for injuries to property occasioned by the overflow of water by reason of the abutment of a bridge being wrongfully built by the road overseer in the channel of the stream.[6] In Illinois, if a city, in the exercise of its right to grade highways, creates a stagnant pond on a man's land, close to his house, it is liable in damages.[7]

§ 404. **Against the Trustees of a Dissolved Corporation for an Accounting.**

Form No. 84.

[TITLE.]

The plaintiff, on behalf of himself, as well as of all other creditors of the ..... company who may come in and contribute to the expenses of this action, complains and alleges:

I. That the ..... company was incorporated on the .....

[1] Johnson v. Santa Clara County, 28 Cal. 545.

[2] Wells v. Pacific Railroad, 35 Mo. 164.

[3] Eustace v. Jahns, 38 Cal. 3.

[4] Winbigler v. City of Los Angeles, 45 Cal. 36; O'Hale v. Sacramento, 48 Id. 212; Krause v. Sacramento, Id. 221; Huffman v. San Joaquin County, 21 Id. 426; Tranter v. City of Sacramento, 61 Id. 271. In what cases an action lies against a village for neglect to maintain sidewalks, see Harrington v. Village of Corning, 51 Barb. 396.

[5] Sherbourne v. Yuba County, 21 Cal. 113.

[6] Crowell v. Sonoma County, 25 Cal. 313.

[7] Nevins v. City of Peoria, 41 Ill. 503.

day of ....., 18 ....., under the "act" [title of act] passed ....., 18 ....., and the acts amending the same.

II. [State cause of action.]

III. That on the ..... day of ....., 18 ....., the said corporation was dissolved by the judgment of the ..... court on that day duly given and made in a certain proceeding in said court then pending, wherein the people of the state of California, upon information of the attorney general of said state, was plaintiff, and the said corporation was defendant (or that it was dissolved on its own petition to the county judge, or otherwise, as the case may be).

IV. That the defendants above named were, at and preceding the date of the dissolution of said corporation, the (trustees, directors, or managers, etc., according to the fact) of said corporation, and upon its said dissolution became the trustees of the creditors (or stockholders) thereof.

V. That the defendants, as such trustees, have received a large amount of money and other property belonging to the said company, but have refused to pay the claim of the plaintiff.

Wherefore, the plaintiff demands judgment.

1. That the defendants account, under the direction of the court, for the property received by them, as aforesaid.

2. For the payment to him of ..... dollars, with interest from the ..... day of ....., 18 ....., and costs, out of the funds in possession of the defendants, or which they may collect.

3. That the defendants, without delay proceed to the discharge of the trusts devolved upon them in the premises.

§ 405. **Dissolution by Surrender by Trustees.**—That the trustees have the power to surrender the franchise, after its debts are paid, is a proposition which admits of no doubt; and if they should do so without having made any disposition of its property, there being no stockholders or creditors, the personal property of the corporation would vest in the state.[1] Chancellor Kent says: "The better opinion seems to be that a corporation aggregate may surrender, and in that way dissolve itself; but then the surrender must be accepted by the government, and be made by some solemn act to render it complete."[2] In Angell & Ames on Corporations (sec. 772), after announcing that some doubt

[1] 2 Kent's Com. 336; Angell & Ames on Corp., sec. 195; People v. President and Trustees of the College of California, 38 Cal. 166.

[2] 2 Kent's Com. 311; The People of the State of California v. President and Trustees of the College of California, 38 Cal. 166; Sullivan v. Triunfo M. Co., 39 Id. 459.

has existed in England touching the powers of a municipal corporation to surrender its corporate existence, the author concludes, that "by far the better opinion is, that where the surrender is duly made and accepted, it is effectual to dissolve a municipal body. In this country, the power of a private corporation to dissolve itself by its own assent seems to be assumed by all judges upon the point."[1]

§ 406. **Trustees, Appointment of, in California.**—Upon the dissolution of a corporation, unless other persons are appointed by the legislature, or by a court of competent authority, the directors or managers of the corporation shall be trustees of the creditors and stockholders.[2]

§ 407. **Powers and Liabilities of Trustees.**—In California the trustees or receivers of a dissolved corporation are jointly and severally responsible to the creditors and stockholders to the extent of the property and effects of the corporation in their hands.[3] Such trustees or receivers may sue and recover the debts and property of the dissolved corporation. And where a common-law receiver sues in the name of the corporation, the declaration must aver that the suit is brought by the direction of the receiver.[4] So when a receiver is appointed, and the assets are assigned to him, even if the corporation is still in being.[5]

§ 408. **Against Director of Insurance Company—Grounds of Unlawful Dividends and Transfers of Assets.**

Form No. 85.

[TITLE.]

The plaintiff complains, and alleges:

I. That from the ..... day of ....., 18..., to the ..... day of ...., 18..., the ..... company was a corporation existing by virtue of the laws of this state, and authorized by law to make insurances.

II. That during the said time the said corporation made insurances for plaintiff, in the sum of ..... dollars, on two vessels, viz.: ..... dollars on a vessel named the "Brother Jonathan," and ..... dollars on a vessel named the "Cen-

[1] The authorities quoted in support are: Hampshire v. Franklin, 16 Mass. 86; McLaren v. Pennington, 1 Paige Ch. 107; Enfield Toll Bridge Co. v. Connecticut Railroad Co., 7 Conn. 45; Slee v. Bloom, 19 Johns. 456; Canal Co. v. Railroad Co., 4 Gill & J. 1; Trustees, etc., v. Zanesville C. and M. Co., 9 Ohio, 203; Penobscot Boom Co. v. Lamson, 16 Maine, 224; Mumm v. Potomac Co., 8 Pet. 281; The People of the State of California v. President and Trustees of the College of California, 38 Cal. 166.

[2] Cal. Civil Code, sec. 400.

[3] Cal. Civil Code, sec. 400.

[4] Bank of Niagara v. Johnson, 8 Wend. 645.

[5] Bank of Lyons v. Demmon, Hill & D. Supp. 398.

tral America;" both of which vessels became total losses, within the meaning of said policies of insurance, and during the voyages for which such insurances were made. And that the amounts of such insurance have not been paid.

III. That at a meeting of the board of trustees of said corporation, at which defendant was present, during the time aforesaid, the defendant with the other trustees made dividends to the stockholders of the said corporation, to a large amount, to wit, to the sum of ..... dollars, which dividends were not made from the surplus profits arising from the business of said corporation.

IV. That at a meeting of the board of trustees of said corporation, at which the defendant was present, and when the said corporation was insolvent and in contemplation of insolvency, the defendant, with the other trustee, made conveyances, assignments, and transfers of the assets and property of said corporation, with the intent of giving a preference to particular creditors of said corporation over other creditors of said company.

V. That the plaintiff is, and was at the times of the aforesaid acts, a creditor of said corporation for the sum of ..... dollars, as aforesaid, and the defendant then was a trustee of said company. That in consequence of the wrongful acts and violations of law by the defendant, with the other directors of said corporation hereinbefore mentioned, the said corporation, prior to said ..... day of ..... and while the plaintiff was such creditor, and the defendant such trustee, became, and now is, wholly insolvent; that plaintiff has sustained loss by reason thereof in the sum of ..... dollars.

[DEMAND OF JUDGMENT]

§ 409. Against Directors of an Incorporated Company for Making Unlawful Dividends, and Distribution of Stock, Adapted to Section 309 of the Civil Code of California—Naming the Defendants as Individuals, not as Directors.

Form No 86.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ...., 18..., and from that day until the ..... day of ..... 18..., the..... company was a corporation existing under the laws of the state of California, and doing business as such, in its said corporate name.

II. That on the ..... day of ..... 18 ..., said Company made and delivered to the plaintiff its promissory

note, of which the following is a copy [insert copy of note]; and that said promissory note remains wholly unpaid, and there is due to the plaintiff thereon the said sum of $....., and interest thereon from the .....day of ....., 18..., at the rate of ..... per centum per annum, all in gold coin of the United States.

III. That the directors of the said corporation on the ..... day of ....., 18..., and while the said corporation was so indebted to the plaintiff, made and declared a dividend to the stockholders thereof of $..... per share, amounting in all to the sum of $....., and afterwards paid the dividend aforesaid to its stockholders aforesaid, and the plaintiff avers that said dividend was not made from the surplus profits arising from the business of said corporation.

IV. That on the ..... day of ....., 18..., the said directors of said corporation divided among and paid the stockholders thereof, the whole of the capital stock of said corporation, to wit, the sum of $.....

V. That the defendants, A. B., C. D., and E. F., and each of them, were, at and during all the times aforesaid, directors of said corporation, and assented to the making of said dividend, and the division and payment of said capital stock as aforesaid.

VI. That said corporation was, on the ..... day of ....., 18..., dissolved. [State how.]

[DEMAND OF JUDGMENT.]

§ 410. **Essential Averment.**—It should appear that the plaintiff was a creditor of the corporation at the time the wrongful acts and violation of law complained of are alleged to have been done or committed.[1]

§ 411. **Grounds of Action.**—The complaint may set forth several grounds, on either of which the defendants would be liable.[2] The statutes of the several states differ so much in regard to the acts which make directors or trustees of corporations individually liable to stockholders or creditors, and the grounds under each statute are so numerous, that we can only give the foregoing as suggestions to the pleader, who will, in all cases, be required to examine with great care the statute under which he is pleading.

§ 412. **Statute.**—But when two different statutes severally authorize an action upon a certain state of facts, the arising of such state of facts constitutes but one cause of action: and a

[1] Ogden v. Rollo, 13 Abb. Pr. 300.
[2] Durant v. Gardner, 10 Abb. Pr. 445; S. C., 19 How. Pr. 94.

plaintiff must elect which statute he will proceed under; and can not complain upon the same facts in two counts, one under each statute.[1]

§ 413. Individual Creditor against Individual Stockholder.

Form No. 87.

[TITLE.]

The plaintiff complains, and alleges:

I. That the ..... Company is now, and since the ..... day of ....., 18..., has been a corporation existing under and by virtue of the laws of this state, for the purpose of mining for silver and other precious metals, and that the principal place of business of the said corporation is, and since the said ..... day of ....., 18..., has been in the city and county of San Francisco, and state of California.

II. That the capital stock of said ..... corporation is, and since the said ..... day of ....., 18..., has been limited to ..... shares, of the par value of ..... dollars per share, making a total capital of ..... dollars.

III. That the whole of said capital stock of said corporation was and is issued to and owned by various persons, who are now and have been such owners of said stock since the ..... day of ...., 18..., and that the full amount thereof has been paid into said corporation by said stockholders, and that all amounts paid in by said stockholders have been expended, and that nothing now remains to pay the claims of the creditors of the said corporation, and that said corporation is insolvent.

IV. That on the ..... day of ....., 18..., the said corporation gave its promissory note to one A. B. for the sum of ..... dollars, payable in gold coin, with interest at ..... per cent per month, a copy of which is hereby annexed, marked "Exhibit A."

V. That said note was afterwards indorsed to the plaintiff by the said A. B.

VI. That on the ..... day of ....., 18..., at ....., the defendant made its acceptance in writing for the sum of ..... dollars, in gold, with interest from date, also payable in gold, for supplies then furnished by the plaintiff to said corporation, at its special instance and request, and delivered the same to the plaintiff.

VII. That on the ..... day of ....., at ....., the defendant made its certain other acceptance in writing for the sum

[1] Sipperly v. Troy and Boston R. R. Co., 9 How. Pr. 83.

of ..... dollars payable to the plaintiff, in gold coin, with interest at the rate of ..... per cent per month, from date, payable in gold coin, for supplies and money then and there furnished by the plaintiff to said corporation, at its special instance and request.

VIII. That on or about the ..... day of....., in the district court of the ..... judicial district, county of ....., in this state, the plaintiff commenced an action against the said corporation, for the sum of ..... dollars principal and interest due upon said note and acceptances, and for costs and damages, all in gold coin.

IX. That afterwards, on the ..... day of ....., 18..., personal service of summons and certified copy of complaint in said action was made on the said ..... company.

X. That afterwards, to wit, on the ..... day of ....., 18..., judgment was rendered in the said action against the said company, the defendant therein, and in favor of this plaintiff, for the full amount of ..... dollars, in United States gold coin.

XI. That afterwards, to wit, on the ..... day of ....., 18..., execution was issued in the said action upon said judgment by the clerk of the said court, and addressed to the sheriff of the said city and county of San Francisco, and which execution was thereupon delivered to said sheriff and on the ..... day of ...., 18..., he returned the same wholly unsatisfied, and that no property could be found within the said county belonging to said ..... company.

XII. That the said ..... company has not paid the said judgment, and that it still remains in full force and effect unsatisfied, unreversed, and not appealed from; and that the plaintiff is the owner thereof.

XIII. That ever since the ..... day of ....., 18..., and also at and during the time when the said debts and liabilities, for said moneys advanced and supplies furnished, accrued and were contracted and incurrred by said corporation, and the said note given and acceptance made, the defendant was a stockholder in the said corporation to the amount of ..... shares of the capital stock of said corporation.

XIV. That the total amount of indebtedness of the said corporation is ..... dollars.

XV. That the proportion of said indebtedness, for which defendant is liable to plaintiff, is ..... dollars per share, in United States gold coin, amounting to the full sum of ..... dollars in gold coin, with interest at the rate of ..... per cent

per month, and payable in gold coin, on ..... dollars of the above amount sued for, and interest at the rate of ..... per cent per month, in gold coin, upon the sum of ..... dollars, the remainder of the above amount sued for.

XVI. That although often requested, still defendant has failed, neglected, and refused to pay the same, or any part thereof.

Wherefore, plaintiff demands judgment against the defendant for the sum of ..... dollars in United States gold coin, and interest on the sum of ..... dollars, at the rate of ..... per cent per month, compounded monthly, payable in like gold coin, and interest on the sum of .... dollars, at the rate of ..... per cent per month, in United States gold coin, and for costs of suit.

[EXHIBIT "A," ANNEXED.]

§ 414. The Same—Shorter Form.

Form No. 88.

[TITLE.]

The plaintiff complains and alleges:

I. That at the times hereinafter mentioned, the ..... company was a corporation created by and under the laws of this state, organized pursuant to an act entitled "An act" [title of act], passed ....., 18..., and the acts amending the same, and supplementary thereto.

II. That on the ..... day of ....., 18..., said company, by its agent duly authorized thereto, made its promissory note dated on that day, a copy of which is hereto annexed, and marked "Exhibit A."

III. That on the ..... day of ...., 18..., in an action in the district court of the ..... judicial district, for the county of ....., to recover the same from said company, judgment was rendered by said court against said company, in favor of the plaintiff for ..... dollars, being .... dollars, the amount due thereon, with interest, amounting to ..... dollars, and costs.

IV. That execution thereon was thereafter issued against said company, and returned wholly unsatisfied.

V. That at the time said debt was contracted, the defendant was a stockholder of said company, holding stock therein to the amount of ..... dollars, being ..... shares of the par value of ..... dollars each; and that he still is such stockholder therein.

[DEMAND OF JUDGMENT]

[EXHIBIT "A" ANNEXED.]

§ 415. **Nature of Stockholder's Liability for Corporate Debts.**—At the common law, a stockholder was not individually liable for the debts of the corporation.[1] Such liability has been very generally created by statute in the several states. These statutes differ largely in their details, and in the extent of the liability which they impose upon the stockholder. Some of the statutes make a stockholder liable for the debts of the corporation to the extent of the value of the stock held by him. By others the liability is limited to such a proportion of the debt or claim against the corporation contracted during the time he was a stockholder as the amount of stock or shares owned by the stockholder bears to the whole of the subscribed capital stock or shares. This latter is the limit of the liability imposed on the stockholders in California.[2] In this state the constitution leaves to the legislature the power to regulate the liabilities of stockholders, and to prescribe the rule by which each stockholder's proportion of such debts shall be ascertained.[3] The stockholder's liability in California is not that of a mere surety. It is primary and original. And the same identical act which casts the liability on the corporation, also casts it on the stockholder.[4] Consequently such liability is not contingent upon a recovery against the corporation,[5] and is not affected by a suspension of the remedy against the corporation.[6] Where, however, the corporate debt is satisfied in part, there is also a *pro tanto* discharge of the liability of the stockholders. Accordingly, in an action against a stockholder for his proportion of a corporation debt which had been partially satisfied by a sale of mortgaged and pledged property, the defendant is only liable for his proportion of indebtedness after the payments have been credited.[7] Such liability is not in the nature of a penalty of forfeiture, but a liability arising from contract.[8] It is not, therefore, barred by the provision of the statute of limitations providing that an action to enforce a penalty or forfeiture must be brought within two years after the cause of

[1] Whitman v. Cox, 25 Me. 335; Shaw v. Boylan, 16 Ind. 384; Ireland v. Palestine, etc., Turnpike Co., 19 Ohio St. 369; Gray v. Coffin, 9 Cush. 192; Nichols v. Thomas, 4 Mass. 232; Vincent v. Chapman, 10 Gill & J. 279.

[2] Const., art. 12, sec. 3 (1879); Cal. Civil Code, sec. 322; French v. Teschemaker, 24 Cal. 543; Mok. Hill Canal Co. v. Woodbury, 14 Id. 265.

[3] Larrabbee v. Baldwin, 35 Cal. 155; French v. Teschemaker, 24 Id. 539.

[4] Prince v. Lynch, 38 Cal. 528; Young v. Rosenbaum, 39 Id. 646; Sonoma Valley Bank v. Hill, 59 Id. 107.

[5] Davidson v. Rankin, 34 Cal. 503.

[6] Young v. Rosenbaum, 39 Cal. 646; Prince v. Lynch, 38 Id. 528.

[7] San José Savings Bank v. Pharis, 58 Cal. 380.

[8] Corning v. McCullough, 1 N. Y. 47; Norris v. Wrenschall, 34 Md. 492; Coleman v. White, 14 Wis. 700; Erickson v. Nesmith, 46 N. H. 371.

action accrued.[1] In New York, however, it has been held that the liability of stockholders is in general an original liability, and an action against them is upon a contract made by them in a qualified corporate capacity. Where, however, the corporate capacity is not thus qualified, the members or officers are not thus liable as original or principal debtors, by reason of something imposed on them by the statute, and the action must be upon the statute to recover a debt in the nature of a forfeiture.[2] The present constitution of California limits the stockholder's liability to debts contracted by the corporation while he occupied such relation.[3] This is also the construction that the courts had put upon the old constitution, in holding that a stockholder did not render himself liable by becoming such for the pre-existing debts of the corporation.[4] Such liability is not released by the stockholder subsequently assigning his stock.[5]

§ 416. **Parties to the Action.**—In California any creditor of a corporation may institute joint or several actions against any of the stockholders, and in such action may recover the proportion of the debt for which each defendant is liable, and have a several judgment against each stockholder, in conformity therewith.[6] In New York, in conformity with the statutory provisions, any separate creditor may maintain an action for the enforcement of his demand, although it seems to be conceded in that state that a joint action may be brought against all the stockholders, for the benefit of all the creditors.[7] In Ohio, on the other hand, it is provided by statute, in conformity with prior decisions, that the action must be against all the stockholders, and by all the creditors, or by one suing in behalf of all.[8] While in Missouri it has been held that if the statute makes the stockholders liable for an amount equal to the amount of their stock, their liability is not joint, but each must be sued separately.[9] If the state is a holder of stock, it can not

[1] Green v. Beckman, 58 Cal. 545.

[2] Bird v. Hayden, 2 Abb. Pr., N. S., 61.

[3] Const., art. 12, sec. 3,

[4] Larrabbee v. Baldwin, 35 Cal. 156. In this case it was held that to determine how much any one stockholder is liable to pay to a corporate creditor, it is necessary to find the whole amount of the indebtedness of the corporation created while he was a stockholder; and any one creditor whose demand is large enough may have judgment for the stockholder's proportion of such corporate debts.

[5] California Civil Code, sec. 322.

[6] California Civil Code, sec. 322; Larrabbee v. Baldwin, 35 Cal. 156.

[7] Weeks v. Love, 50 N. Y. 568; Mann v. Pentz, 3 Id. 415; Garrison v. Howe, 17 Id. 458; Briggs v. Penniman, 8 Cow. 387; Osgood v. Laytin, 5 Abb. Pr., N. S., 1.

[8] R. S., sec. 3250; Umsted v. Buskirk, 17 Ohio St. 113.

[9] Perry v. Turner, 55 Mo. 418.

be made a party defendant.[1] And where any stockholder pays his proportion of any debt due from the corporation, incurred while he was a stockholder, he is relieved from any further liability for such debt, and if an action has been brought against him upon such debt, it must be dismissed as to him.[2] One stockholder, however, can not recover against another a debt due him from the company.[3] And as between the corporation and its stockholders, the corporate property is the fund primarily liable for the corporate debts.[4]

§ 417. **Essential Averments in Such Action.**—An action to enforce the personal liability of stockholders is, in many cases, to be considered as founded on that vestige of the relation of partnership between the members of the company which the charter or general act failed to remove.[5] In such action the complaint must show that the defendant was a stockholder at the time the debt was contracted;[6] and an averment to this effect in the words of the charter is sufficient;[7] otherwise a judgment which has been rendered by default will be set aside.[8] So, also, the grounds on which they are individually liable must be shown.[9] And in pleading the amount of the stockholder's liability, it must be averred that such stockholder held an amount of stock equal to the amount for which he is sought to be held liable.[10] It is not necessary, however, to aver that the corporation is insolvent.[11] Nor in an action to enforce a promissory note is it necessary to aver the facts showing for what the note was given.[12] In many of the states, before a creditor can proceed against a stockholder, he must have recovered judgment against the corporation, and the execution issued thereon must have been returned unsatisfied. Where such facts are necessary to fix the stockholder's liability the complaint must allege their performance.[13] Where, however,

[1] Miers v. Zanesville etc. Turnp. Co., 11 Ohio, 273.

[2] California Civil Code, sec. 322; Larrabbee v. Baldwin, 35 Cal. 156.

[3] Bailey v. Bancker, 3 Hill (N. Y.), 188.

[4] Prince v. Lynch, 38 Cal. 528.

[5] Corning v. McCullough, 1 N. Y. 47; Conant v. Van Schaick, 24 Barb. 87; Bailey v. Bancker, 3 Hill, 88. For a form of complaint against stockholders, see Herkimer Co. B'k v. Furman, 17 Barb. 116; Witherhead v. Allen, 28 Id. 661.

[6] Young v. New York etc. S. S. Co., 15 Abb. Pr. 69; Larrabbee v. Baldwin, 35 Cal. 155.

[7] Freeland v. McCullough, 1 Den. 414.

[8] Hooker v. Kilgour, 2 C. S. C. R. 550; Kearney v. Buttles, 1 Ohio St. 362.

[9] Geery v. New York etc. S. S. Co., 12 Abb. Pr. 268.

[10] Chambers v. Lewis, 16 Abb. Pr. 443.

[11] Parkins v. Church, 31 Barb. 84; Davidson v. Rankin, 34 Cal. 503.

[12] Gebhard v. Eastman, 7 Minn. 56.

[13] Conant v. Van Schaick, 24 Barb. 87; Wright v. McCormack, 17 Ohio St. 86; Blake v. Hinkle, 10 Yerg. 218; Cowles v. Bartell, 2 West. Law Month. 41; Hays v New Balt. etc. Tp. Co., 1 Handy, 281.

the performance of such conditions precedent would plainly be of no avail, as where the corporation is insolvent, or in the hands of a receiver, or dissolved, the necessity of averring a recovery of judgment no longer exists, if the complaint contains other facts sufficient to excuse it.[1] Such rule does not prevail in California, as in that state the stockholder's liability is created at the same time as the liability against the corporation.[2] Though a stockholder is individually liable for debts contracted while he was a stockholder, yet a judgment recovered against the corporation while he is a stockholder, upon a contract entered into before he became such stockholder, is not a contract within the meaning of the act rendering such stockholder liable. And proof of a judgment against a corporation does not show when the debt was contracted.[3]

§ 418. **Who Liable as Stockholders in Such Action.** The civil code of California provides that not only shall those whose names appear on the books of the corporation be liable as stockholders, but also every equitable owner of stock, although the same appears on the books in the name of another; and also every person who has advanced the installments or purchase money of stock in the name of a minor; and also any guardian, or other trustee, who voluntarily invests any trust funds in the stock. The pledgee of stock is not liable as a stockholder within the meaning of such code. In corporations having no capital stock, each member is individually and personally liable for his proportion of the debts, and actions may be brought against him, either alone or jointly with other members, to enforce such liability. The liability of stockholders of foreign corporations doing business in California is the same as that of stockholders of domestic corporations.[4] Prior to the enactment of such statute it was held that one who never accepts, but refuses to accept any stock in a corporation, is not a

[1] Shellington v. Howland, 53 N. Y. 371; Lovett v. Cornwell, 6 Wend. 369; People v. Bartlett, 3 Hill, 570; Loomis v. Tifft, 16 Barb. 541; Dryden v. Kellogg, 2 Mo. App. 87; State Savings Ass'n v. Kellogg, 52 Mo. 583; Paine v. Stewart, 33 Conn. 516; Merrill v. Suffolk Bank, 31 Me. 57; Hetzel v. Tannehill Silver Min. Co., 4 Abb. N. Cas. 40; Warner v. Callender, 20 Ohio St. 190.

[2] Davidson v. Rankin, 34 Cal 503; Prince v. Lynch, 38 Id. 528; Cal. Civ. Code, sec. 322. As to whether a stockholder is liable for the cost of the judgment against the company, see Bailey v. Bancker, 3 Hill (N. Y.), 188; Andrews v. Murray, 9 Abb. Pr. 8.

[3] Larrabbee v. Baldwin, 35 Cal. 156; Miller v. White, 50 N. Y. 137. But see Hastings v. Drew, 76 Id. 9, where such judgment was said to be at least *prima facie* evidence of liability; also Corse v. Sandford, 14 Iowa, 235; Thayer v. New England, etc., Print. Co., 108 Mass. 523; Milliken v. Whitehouse, 49 Me. 527; Tyng v. Clarke, 9 Hun, 269.

[4] California Civil Code, sec. 322.

stockholder, even though the secretary enters his name in the books as such, and the stock book of the corporation is not admissible in evidence in an action by a creditor of the corporation against one claimed to be a stockholder for the purpose of proving that he is such stockholder.[1] And in Ohio, parties whose names are nominally on the corporation books, but who never were actually owners of stock, their contracts not having been fulfilled, are not liable as stockholders.[2]

CHAPTER IV.

EXECUTORS AND ADMINISTRATORS.

§ 419. By an Executor.

Form No. 89.

[TITLE.]

A. B., Executor of the Will of C. D., Deceased, Plaintiff, *against* JOHN DOE, Defendant.

The plaintiff, as such executor, complains, and alleges:

I. [State cause of action.]

II. That the said C. D. in his life-time made and published his last will, whereby he appointed the plaintiff executor thereof.

III. That on the ..... day of ....., 18.., at ...., the said C. D. died.

IV. That on the ..... day of ....., 18.., at ....., said will was proved and admitted to probate, in the superior court in the county of ....., in this state.

V. That thereupon, on the ..... day of ....., 18..., letters testamentary were issued on the said will to the plaintiff, by the superior court of said county.

VI. That thereupon the plaintiff duly qualified and entered upon the discharge of his duties as executor, and that said letters testamentary have not been revoked.

[DEMAND OF JUDGMENT.]

§ 420. By an Administrator.

Form No. 90.

[TITLE.]

The plaintiff, as such administrator, complains, and alleges:

I. [State cause of action accruing to the intestate.]

II. That on the ..... day of ....., 18..., at ....., the said A. B. died intestate.

[1] Mudgett v. Horrell, 33 Cal. 25.

[2] Wehrman v. Reakirt, 1 C. S. C. R. 230.

III. That on the day..... of ....., 18 ....., letters of administration upon the estate of the said A. B. were issued by the superior court of the county of ....., in this state, to the plain iff.

IV. That the plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of the duties of his said office, and that said letters of administration have not been revoked.

[Demand of Judgment.]

§ 421. **Essential Averments of Representative Capacity.**—The capacity of the plaintiff to sue is independent of the cause of action, and, therefore, in an action by an executor or administrator to enforce a cause of action on which he is authorized to sue as such, the complaint must allege his representative capacity. No formal mode of allegation is essential, provided the plaintiff's right to maintain the action is substantially shown, so that issue may be joined thereon.[1] In conformity with this rule, the complaint should state, in cases of testacy, the death of the decedent, his leaving a last will and testament, the appointment therein of the plaintiff as executor, the probate of the will, the issuance of letters testamentary thereon to the plaintiff, and his qualification and entry upon the discharge of his duties as executor, and that he is still acting as such.[2] In cases of intestacy, the death of the decedent, without leaving a last will and testament, must be shown, together with appropriate allegations of the plaintiff's appointment as administrator, his qualification and entry upon the discharge of his duties as such, and that he is still so acting; and this is so although the plaintiff may be the public administrator.[3] In the case of either an executor or administrator, the date, place, and court by whom letters were granted should be stated.[4] If this is not

[1] Bank of Lowville v. Edwards, 11 How. Pr. 216; Johnson v. Kemp, 11 Id. 186; President of Hanover Bank v. Wickham, 16 Id. 97; Thomas v. Cameron, 16 Wend. 579; Halleck v. Mixer, 16 Cal. 574; Barfield v. Price, 40 Id. 535; Beach v. King, 17 Wend. 197; Welles v. Webster, 9 How. Pr. 251; English v. Roche, 6 Ind. 62; Duncan v. Duncan, 19 Mo. 368; State v. Matson, 38 Id. 489; Bird v. Cotton, 57 Id. 568; State v. Patton, 42 Id. 530; Headlee v. Cloud, 51 Id. 301.

[2] Thomas v. Cameron, 16 Wend. 579; Halleck v. Mixer, 16 Cal 574; Barfield v. Price, 40 Id. 535.

[3] Ketchum v. Morrell, 2 N. Y. Leg. Obs. 58.

[4] Morrell v. Dickey, 1 Johns. Ch. 156; Williams v. Storrs, 6 Id. 353; Vroom v. Van Horn, 10 Paige Ch. 550; Vermilya v. Beatty, 6 Barb. 429; Warren v. Eddy, 13 Abb. Pr. 28; Gulick v. Gulick, 21 How. Pr 22; Robins v. Wells, 26 Id. 15; Emery v. Hildreth, 2 Gray, 228; Bloom v. Burdick, 1 Hill, 134; Beach v. King, 17 Wend. 197; Gillet v. Fairchild, 4 Denio, 80; White v. Joy, 3 Kern. 83; Forrest v. Mayor of N. Y., 13 Abb. Pr. 350; Christopher v. Stockholm, 5 Wend. 36; Tolmie v. Dean, 1 W. T. 60; Dayton v. Connah, 18 How. Pr. 326; Shaldon v. Hoy, 11 Id. 11; Barfield v. Price, 40 Cal. 535.

done, the complaint is bad on demurrer on that ground.[1] By parity of reasoning, where suit is brought by an administrator during the minority of the executor, his powers being determined when the executor attains full age, the fact that he has not attained majority must be averred.[2] Where the plaintiff's representative capacity is shown, profert of letters testamentary or of administration is no longer necessary.[3]

§ 422. **Illustrations of Sufficient and Insufficient Allegations.**—In New York, the word "as" is essential in the title to the action, nor can it be easily replaced by any other word. Thus, a declaration which invariably and more than a dozen times mentioned the plaintiff as "the said Sarah, executrix as aforesaid," closing with profert of letters testamentary, was held to be fatally defective under the old practice.[4] In the same state a complaint averring that the plaintiff has been duly appointed and qualified by the surrogate of New York, to act as the "sole executor of A. B., deceased," was held not sufficient in an action to recover a demand due the estate of the plaintiff's testator;[5] and the allegation "duly appointed" was held to be not insufficient, but indefinite.[6] A complaint commencing "A. B., administrator of the goods, etc., of ....., deceased, plaintiff in this action," and containing no other statement of the fact of the plaintiff's appointment as administrator, does not allege that he is administrator, or show that he prosecutes in that capacity.[7] On the contrary, a bill alleging that there was no instrument purporting to be the last will and testament of M., deceased, duly executed and attested; that it

[1] Shaldon v. Hoy, 11 How. Pr. 11. For a form of averment alleging appointment, see Beach v. King, 17 Wend. 197; Gillett v. Fairchild, 4 Den. 80. Section 161, N. Y. Probate Code, and section 1365, Cal. Code C. P., are applicable to the decision of the surrogate (probate court) in the appointment of an administrator: Anderson v. Potter, 5 Cal. 63; Wheeler v. Dakin, 12 How. Pr. 537. For a complaint by an administrator, with the will annexed of a deceased judgment creditor who was resident of a foreign state, see Wheeler v. Dakin, Id.

[2] Yeaton v. Lynn, 5 Pet. 223.

[3] Bright v. Currie, 5 Sand. 433; Welles v. Webster, 9 How. Pr. 251.

[4] Heuschall v. Roberts, 5 East, 151, 154. Compare Merritt v. Seaman, 6 N. Y. (2 Seld.) 168, with Smith v. Levinus, 8 N. Y. (4 Seld.) 474; and see, also, Gould v. Glass, 19 Barb. 185; Shaldon v. Hoy, 11 How. Pr. 14; Ogdensburg Bank v. Van Rensselaer, 6 Hill, 241. If the plaintiff's character is thus stated in the title, it is not necessary to repeat it, but he may afterwards be called "the plaintiff." Stanley v. Chappell, 8 Cow. 235.

[5] Forrest v. Mayor of N. Y., 13 Abb. Pr. 350.

[6] Cheney v. Fisk, 22 How. Pr. 238; People v. Walker, 23 Barb. 305; People v. Ryder, 2 Kern. 433.

[7] Merritt v. Seaman, 6 N. Y. 168; Shaldon v. Hoy, 11 How. Pr. 11; Christopher v. Stockholm, 5 Wend. 36; Worden v. Worthington, 2 Barb. 368. Promises made to the testator should not be stated as made to "the plaintiff." Worden v. Worthington, Id. 370; Christopher v. Stockholm, 5 Wend. 36.

was admitted to probate as such will; that letters testamentary were issued, and that the executors took upon themselves the execution of the instrument, sufficiently shows that the instrument was a will, and that it had been so adjudged by the surrogate's court.[1] And so, also, a complaint which describes the plaintiff as an executor, and states the cause of action as an indebtedness due to the plaintiff as an executor, and that the money was had and received by the defendant for the use of the plaintiff as such executor, sufficiently shows that the plaintiff sues in his representative capacity.[2] And an averment that letters testamentary on, etc., and not before, were issued to, etc., is sufficient to import that no other or prior letters had been issued.[3] In Missouri, a petition stating the character in which the plaintiff sued, the indebtedness to the intestate, and the prayer for judgment as administratrix, was held sufficient as showing her right to sue.[4] In California, in an action brought by an administrator who has been appointed after the resignation of a former administrator, the complaint is sufficient if it avers the issue of letters to the former administrator, that he qualified and entered upon the discharge of the trust, that he resigned, and his resignation was accepted by the probate court, and that the plaintiff was afterwards appointed administrator, and qualified, and that letters were issued to him.[5] And the same effect was given to an averment that letters of administration were issued on a certain day, by the appropriate court, to the plaintiff, who duly qualified as such administrator, and entered upon the discharge of his duties as such, and now is, and has been, continuously from the date of appointment, such administrator.[6] In that state there are only two classes of administrators, special and general; and no such officer as an "administrator *de bonis non*" is known to our law. When the authority of a general administrator is terminated, and a new one appointed, the latter takes the place of the first, and succeeds to the office, clothed with the same powers, and subject to the same restrictions; and when he invokes the action of the court, he must institute the same proceedings, and, so far as he is able, must make a similar showing.[7] The order for the appointment, the qualifications of the appointee, and the issuing of letters to him thereon, are all necessary proceedings to invest such appointee with the office

[1] Mason v. Jones, 13 Barb. 461.
[2] Serantom v. Farmers' etc. Bank, 38 Barb. 527.
[3] Benjamin v. De Grott, 1 Den. 151.
[4] Duncan v. Duncan, 19 Mo. 365.
[5] Lucas v. Todd, 28 Cal. 182.
[6] McCutcheon v. Weston, 1 West Coast Rep. 850.
[7] Haynes v. Meeks, 20 Cal. 288.

of an administrator. The appointment is *in fieri* until the appointee has qualified and received his letters.[1]

§ 423. **Action by Foreign Administrator or Executor.** Except as modified by the statute, the authority of an executor or administrator is limited to the state or country in which he receives his authority. Consequently he is not authorized to maintain an action in his representative capacity outside of such state. If objection is not raised to the plaintiff's capacity to sue, either by answer or demurrer, it is waived.[2] But it has been held that a plaintiff may maintain a suit in the United States circuit court, as a citizen of Maine, in his character of administrator if he has taken out his letters in New Hampshire.[3]

§ 424. **Commencement of Complaint by Executor or Administrator Suing in his own Right.**

Form No. 91.

[TITLE.]

The plaintiff complains, as administrator of the estate [or executor of the will] of A. B., deceased, and alleges:

I. [State cause of action.]

[DEMAND OF JUDGMENT.]

§ 425. **Executor or Administrator, when may Sue in Own Name.**—Contracts made by an executor or administrator subsequently to the death of the deceased, although affecting the assets of the estate, may be sued on by such executor or administrator in his personal, and not in his representative capacity. The action need not necessarily be in such form, as the executor or administrator has an election whether to sue personally or in a representative capacity.[4] Thus an executor or administrator may sue in his own name to recover back money of the estate paid by mistake;[5] or on a note payable to him as representative;[6] or to bearer;[7] or to him individually for money due the estate;[8] or for the price of property sold by him as

[1] Estate of Hamilton, 34 Cal. 464.

[2] Ham v. Henderson, 50 Cal. 367; Cashman v. Wood, 6 Hun, 520; Robbins v. Wells, 18 Abb. Pr. 191; Connor's Adm'x v. Paul, 12 Bush, 144; Duncan v. Whedbee, 4 Col. 143; Mullin's Appeal, 40 Wis 154; Harte v. Houchin, 50 Ind. 327; Wright v. Wright, 72 Id. 149; S. W. R'y v. Paulk, 24 Ga. 370; Dougherty v. Walker, 15 Id. 441; Brookshire v. Dubose, 2 Jones Eq. 279; Rucks v. Taylor, 49 Miss. 560; Palmer v. Ins. Co., 84 N. Y. 67.

[3] Carter v. Treadwell, 8 Story C. C. 25.

[4] Mowry v. Adams, 14 Mass. 327.

[5] Rogers v. Weaver, Wright, 174; Gulke v. Uhlig, 55 How Pr. 434.

[6] Rittenhouse v. Ammerman, 64 Mo. 197; Merritt v. Samen, 6 N. Y. 168; Carleton v. Byington, 17 Iowa, 579; Kalkhoff v. Zoehrlaut, 40 Wis. 427.

[7] Holcomb v. Beach, 112 Mass. 450.

[8] McGehee v. Slater, 50 Ala. 431; Walt v. Walsh, 10 Heisk. 314; Cocker v. Cocker, 2 Mo. App. 451; Blankenship v. Nimmo, 50 Ala., 506.

representative;[1] or on a judgment obtained by him;[2] or for the wrongful conversion of the property of the estate,[3] although such conversion was made prior to his appointment. In such case he has a special property in the goods taken sufficient to support the action. No demand is necessary if such taking were were tortious.[4]

§ 426. **Against an Administrator or Executor.**

Form No. 92.

[TITLE.]

A. B., Plaintiff,
against
C. D., Administrator or (Executor) of the estate of E. F., deceased, Defendant

The plaintiff complains, and alleges:

I. [State a cause of action against the decedent.]

II. [Allege death of decedent, and defendant's appointment as administrator or executor, as in preceding forms.]

III. That said defendant, as such executor [or administrator], in pursuance of an order of the superior court of ..... county, caused a notice to the creditors of said deceased to be published in ....., the same being the newspaper designated by said court, requiring all persons having claims against said deceased to exhibit them, with the necessary vouchers to the said executor [or administrator] at [specify the place], the same being specified therein as his place of business, within .... months after the first publication of said notice; that said notice was first published on the ..... day of ....., 18..

IV. That on the .... day of ...., 18..., at ...., the claim hereinbefore set forth, verified by the oath of the claimant, and upon which this action is founded, was duly presented in writing by the plaintiff to the defendant, as such administrator [or executor], for allowance. And that the same was by him, as such administrator or executor, rejected, on the .... day of ....., 18.. That a copy of said claim as presented is hereunto attached and made a part of this complaint

[DEMAND OF JUDGMENT.]

§ 427. **Action against Executor or Administrator on New Promise.**—Whether an executor or administrator can, by a new promise, revive a debt barred by the statute of limitations, depends upon the special statutes of the different states. Where there is no limitation upon the power of the executor or administrator imposed by statute, it has been held that a new

[1] Laycock v. Oleson, 60 Ill. 30.
[2] Page v. Cravens, 3 Head, 383; Hunt v. Lisle, 6 Yerg. 417.
[3] Munch v. Williamson, 24 Cal. 167.
[4] Ham v. Henderson, 50 Cal. 367.

promise would avoid the statute.[1] In South Carolina it has been held that before the bar of the statute is complete, the administrator may revive the debt by an acknowledgment or promise.[2] In another case in that state it was held that a promise by the executor would revive a debt barred by the statute at the time of the acknowledgment or promise, if not barred at the death of the testator.[3] In California, the allowance of a claim against an estate, after it is barred by the statute, is prohibited.[4] But a widow, executrix of an estate of her deceased husband, who has an interest in the same, who gives her own note for a debt of her husband, which is barred, under the mistaken opinion that it is still binding, will be held personally liable thereon.[5]

§ 428. **Presentation of Claims against Estate.**—Statutes have been passed in most of the states which limit the absolute right of the creditors of a deceased debtor to proceed against the estate. These statutes differ greatly in their details, but their general effect is to require the creditor to present his claim to the executor or administrator, within a certain time, for allowance. If not, such claim is forever barred. In California the executor or administrator is required to publish notice to creditors to present their claims against the estate. If the value of the estate exceeds ten thousand dollars, such time is limited to ten months after the first publication; otherwise to four months. All claims arising upon contract, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever. Where, however, it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered.[6] Every claim which is due when presented to the executor or administrator must be verified by the affidavit of the claimant, or some one in his behalf, to the effect that the amount thereof is justly due; that no payments have been made thereon which are not credited, to the knowledge of the affiant. If the claim be not due when presented,

[1] Executors of Niemcewicz v. Bartlett, 13 Ohio, 271; Brown v. Anderson, 13 Mass. 201.

[2] Wilson's Adm'r v. Wilson, 1 McMullan's Eq. 329.

[3] Pearce v. Ex'rs of Zimmerman, Harp. 355.

[4] Code of Civil Proc., sec. 1499. Upon this subject generally, see Dawes v. Shed, 15 Mass. 6, and note, p. 8; Thompson v. Brown, 16 Id. 171; Ross v. Ross, 6 Hun, 80; Estate of Hidden, 23 Cal. 362.

[5] Mull v. Van Trees, 50 Cal. 547.

[6] Code of Civil Proc., secs. 1490–1493; Estate of Taylor, 16 Cal. 434; Cullerton v. Mead, 22 Cal. 96.

or be contingent, the particulars of such claim must be stated.[1] Upon the presentation of a claim the executor or administrator must indorse thereon his allowance or rejection, with the date thereof. If he allows the same, it must be presented to the judge for his approval, who must indorse thereon his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection, for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day. If the claim be presented to the executor or administrator before the expiration of the time limited, it is a sufficient presentation, although not acted upon until after the expiration of such time.[2] After the allowance of a claim by the executor or administrator and the judge, the statute provides that it shall be filed in court within thirty days, and thereafter it ranks among the acknowledged debts of the estate to be paid in due course of administration.[3] The foregoing provision, so far as the time in which the filing of an approved claim is concerned, has been held merely directory.[4] If the claim be founded on a bond, bill, note, or other instrument, a copy of such instrument must accompany the claim. If the claim has been secured by mortgage or other recorded lien, it is sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record.[5] If the claim is rejected, either by the executor or administrator, or judge, suit must be brought thereon within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise it is barred forever.[6] The time during which there is a vacancy in the administration is not included in such limitation.[7] If an action is pending against the decedent at the time of his death, the plaintiff must, in like manner, present his claim for allowance, authenticated as in other cases; and no recovery can be had in the action unless proof be made of such presentation.[8] If the defendant dies after verdict against him, and before judgment, the claim need not be presented. The proper practice in such case is to direct the entry of a judgment against him by name, and then suspend all further proceedings until the substitution of an executor or ad-

[1] Code of Civ. Proc., sec. 1494.
[2] Code of Civ. Proc., sec. 1496.
[3] Code of Civ. Proc., sec. 1497.
[4] Willis v. Farley, 24 Cal. 501; Estate of Schroeder, 46 Id. 304.
[5] Code of Civ. Proc., sec. 1497.
[6] Code of Civ. Proc., sec. 1498; Benedict v. Haggin, 2 Cal. 385; Hall v. Smith, 19 Id. 85; Rice v. Inskeep, 34 Id. 224.
[7] Danglada v. De la Guerra, 10 Cal. 886; Smith v. Hall, 19 Id. 85.
[8] Code of Civ. Proc., sec. 1502.

ministrator.[1] Such judgment is not a lien on the real estate of the decedent, but is payable in due course of administration.[2] An objection that such claim was not presented to the administrator or executor, after the death of the defendant, must be made in the court below. It comes too late if made in the appellate court for the first time.[3]

§ 429. **The Same—Further Construction of California Statutes.**—The words "claimant" and "claim" and "demand," as used in the California statutes, are synonymous, and have reference to such debts and demands against the decedent as might have been enforced against him during his life-time, by personal action, for the recovery of money, and upon which only a money judgment could have been rendered.[4] They do not include expenses incurred in the administration,[5] or the family allowance,[6] as the object of the statute is mainly to prevent estates from being squandered or wasted in unnecessary litigation;[7] nor an assessment for public improvements made after the death of the decedent.[8] And in an action of accounting between a surviving partner and the representative of the deceased partner, the surviving partner is entitled to an allowance for sums drawn by the deceased partner from the partnership assets in his life-time, although the claim for the sum so drawn has never been presented for allowance and approval,[9] as the claim for such advances need not be presented until the partnership affairs are wound up.[10] Nor need a claimant of specific property present a claim.[11] Claims which are necessary to be presented may be, before notice to creditors is published.[12] In Ohio a formal presentation of a claim, which the administrator had previously seen, is not necessary when, on being requested to allow it, he refuses, the claim being then present in the owner's pocket.[13] A refusal to allow a claim in that state is equivalent to a rejection,[14] but the requirements of presentation does not apply to proceedings to revive an action before judgment against the personal representative.[15] In Missouri a de-

[1] Estate of Page, 50 Cal. 40.
[2] Code of Civil Proc., sec. 1503; Drake v. Foster, 52 Cal. 225.
[3] Drake v. Foster, 52 Cal. 225.
[4] Gray v. Palmer, 9 Cal. 616; Fallon v. Butler, 21 Id. 32; Estate of McClausland, 52 Id. 568.
[5] Deck v. Gherke, 6 Cal. 666.
[6] Estate of McClausland, 52 Id. 568.
[7] Ellissen v. Halleck, 6 Cal. 386; Falkner v. Folsom, Id. 412.
[8] Hancock v. Whittemore, 50 Cal. 522; People v. Olvera, 43 Id. 492.
[9] Manuel v. Escolle, 2 West Coast Rep. 375.
[10] Gleason v. White, 34 Cal. 258.
[11] Gunter v. Janes, 9 Cal. 643.
[12] Ricketson v. Richardson, 19 Cal. 330; Janin v. Browne, 9 Id. 37.
[13] Kyle's Adm'r v. Kyle, 15 Ohio St. 15.
[14] Harter et al. v. Taggart's Ex'rs, 14 Ohio St. 122; Stambaugh v. Smith, 23 Id. 584.
[15] Musser's Ex'rs v. Chase, 29 Ohio St. 577.

fendant in an action by an administrator need not aver presentation of a set-off.[1] Nor, in New Jersey, need an assignee, whose assignor presented the claim, again present it.[2] In Arkansas a plaintiff seeking to foreclose a mortgage or vendor's lien need not present the same for allowance.[3] In Idaho it has been held that when the United States comes into court seeking to enforce a claim against an estate, it is subject to the same statutory requirements as individuals and must present its claim.[4] The non-presentation of a claim only defeats the present right to recover. If the plaintiff has failed in his action by reason of such non-presentation, the claim may be presented if within the statutory time, and if rejected, a new suit instituted which will not be barred by the former judgment.[5]

§ 430. **Allowance and Rejection of Claims.**—An allowance of a claim by one executor is sufficient to bind the estate.[6] Such allowance must be made in writing; a verbal allowance gives the claimant no cause of action.[7] After allowance by the executor or administrator, and approval by the judge, the claim has the force and effect of a judgment against the estate, and is payable in due course of administration.[8] The presentation of a claim to the executor or administrator is the commencement of a suit upon it, and stops the running of the statute of limitations.[9] And where the executor neglects to indorse his allowance or rejection for more than ten days, the law presumes that the claim was rejected on the expiration of the tenth day.[10] The claimant of a rejected claim, in recovering judgment thereon is entitled to interest from the time of presentment.[11]

§ 431. **Presentation of Claim Secured by Mortgage —In California.**—The statutes of California regulating the presentation of claims secured by mortgage or other lien have been frequently changed. The decisions of the courts in that state, unless interpreted with reference to the provisions of the particular statute applicable thereto, would seem in irreconcilable conflict. Under the original sections of the act to regulate the estates of deceased persons, the requirement that all claims

[1] Lay, Adm'r etc. v. Mechanics' Bank, 61 Mo. 72.
[2] Ryan v. Flanagan, Adm'x, 38 N. J. L. 161.
[3] Allen v. Smith, 29 Ark. 74; Williams v. Richardson, 32 Id. 297; McClure v. Owens, 32 Id. 443.
[4] United States v. Hailey, 2 West Coast Rep. 324.
[5] Hentsch v. Porter, 10 Cal. 560.
[6] Willis v. Farley, 24 Cal. 490.
[7] Pitte v. Shipley, 46 Cal. 154.
[8] Estate of Cook, 14 Cal. 129; Deck's Estate v. Gberke, 6 Id. 666; Estate of Hidden, 23 Id. 363; Magraw v. McGlynn, 26 Id. 420; Pico v. De la Guerra, 18 Id. 422; McKinney v. Davis, 6 Mo. 501; Kennerly v. Shepley, 15 Id. 640.
[9] Beckett v. Selover, 7 Cal. 215.
[10] Rice v. Inskeep, 34 Cal. 225.
[11] Pico v. Stevens, 18 Cal. 377.

must be presented for allowance or rejection before any action could be maintained thereon was held broad enough to include claims secured by mortgage.[1] Such continued to be the law on this subject until the adoption of the code of civil procedure in 1873. By sections 1493 and 1500 thereof it was rendered unnecessary for the holder of a mortgage or other lien to present the same to the representative of the estate. In 1874 these sections were amended so as to render such presentation necessary. In 1876 these sections were again amended so as to make a presentation unnecessary. Section 1500, after providing that no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, contains the following provision: "An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented." These sections as amended in 1876 continue to be the law in California,[2] and render it unnecessary for a pledgee to present his claim to the representative of the pledgor, unless he seeks recourse against other property of the estate than that pledged.[3] And in construing the amendments of 1874 repealing the provision authorizing actions upon mortgages to be maintained against the property of the estate of a deceased mortgagor, without presentation, it has been held that the same are not retroactive, and do not give to a notice to creditors previously published, any effect which it did not have under the law under which it was published; and that a mortgage falling due after the amendment was not barred by a failure to present the claim.[4] If, however, the mortgage or other lien is on the homestead, the claim must be presented for allowance, as section 1475 of the code of civil procedure requires such presentation, and section 1500 will be construed so as to give it effect.[5] But where a debtor, before his decease, conveys land to a person in trust, to secure his promissory note, and after his decease the creditor fails to present his claim to the executor or administrator within the time fixed by the statute after publication of notice to cred-

[1] Probate Act, secs. 130, 136; Ellissen v. Halleck, 6 Cal. 386; Pico v. De la Guerra, 18 Id. 428; Fallon v. Butler, 21 Id. 32; Willis v. Farley, 24 Id. 490; Ellis v. Polhemus, 27 Id. 350; Pitte v. Shipley, 46 Id. 160; Marsh v. Dooley, 52 Id. 232.

[2] Hibernia Savings etc. Soc. v. Jordan, 5 Pac. C. L. J. 381.

[3] Estate of Kibbe, 57 Cal. 407.

[4] Hibernia S. & L. Soc. v. Hayes, 56 Cal. 297.

[5] Camp v. Grider, 62 Cal. 20

itors. the executor can not invoke the power of a court of equity to compel the surrender of the security, or to enjoin the creditors from selling the land under the power contained in the deed of trust.[1] This rule is based upon the well-known doctrines that statutes of limitations do not destroy the right of action, but merely bar the remedy, and that he who seeks equity must do equity.

§ 432. **Allegation of Presentation, and Rejection of Claim.**—Where the statute provides that claims must be presented for allowance, and rejected before action can be maintained thereon, all the facts necessary to show a valid presentation and rejection, with the dates on which they severally occurred, must be alleged. It is well also to attach to and make part of the complaint a copy of the claim as presented, that the court may judge of its legal sufficiency.[2]

§ 433. **Forms of Complaints—Description of Party—Capacity—Promise.**—In an action against executors for a legacy, plaintiff must aver and prove existing assets.[3] A legatee who has been represented by counsel at the allowance of accounts against the estate, will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence. In such a case it is not sufficient to allege ignorance at the time of allowance, but the plaintiff must go further, and show that he could not, with the use of due diligence on his part, have made himself acquainted with, or ascertained the existence of the facts.[4] A declaration on a promise made by the defendant as administrator must aver assets in order to charge him personally *de bonis propriis*.[5] In Louisiana, an action brought by a creditor of a testator against his executor, charging him with a *devastavit*, without averring proceedings to compel the defendant to exhibit a table of distribution, can not be maintained.[6] A complaint against

[1] Whitmore v. San Francisco Savings Union, 50 Cal. 145. See also Sichel v. Carrillo, 42 Id. 493.

[2] Ellissen v. Halleck, 6 Cal. 393; Falkner v. Folsom, Id. 412; Hentsch v. Porter, 10 Id. 558; Fallon v. Butler, 21 Id. 24; Ellis v. Polhemus, 27 Id. 354; Benedict v. Haggin, 2 Id. 386; Janin v. Browne, 59 Id. 87. In this latter case, a complaint that alleged that the claim sued upon was presented to the administrator within the time limited in the notice to creditors, and a copy of the claim presented, with the verification annexed, together with the indorsements thereon, was attached to the complaint, was held sufficient.

[3] Dewitt v. Schoonmaker, 2 Johns. 243.

[4] Williams v. Price, 11 Cal. 212.

[5] Adams v. Whiting, 2 Cranch C. Ct. 132. As to sufficiency of complaint against executrix, in her own wrong, which did not charge her as such, see Harper v. West, 1 Cranch C. Ct. 192; or of one which did not show by whom the letters are granted: Cawood v. Nichols, 1 Id. 180.

[6] McGill v. Armour, 11 How. U. S. 142.

executors seeking to charge them in their representative capacity can not be sustained on demurrer, if the facts alleged show only a personal liability on their part.[1] If the defendant is described in the caption of the complaint as administrator, it is immaterial so long as the facts stated in the body of the complaint show he is not sought to be charged as administrator.[2]

In an action against executors, plaintiff may, to save the statute of limitations, lay the promise as made by the representative.[3] A complaint which alleges a promise by deceased, and also a promise by his administrators, though informal, is not bad on general demurrer, if it appears that defendants are charged in their representative capacity.[4] Where the complaint did not state that the promises were made in the testator's lifetime, nor to him, nor for an indebtedness to him, nor to them as administrators, the action is in their individual and not in their representative capacity.[5]

§ 434. **Torts, Actions of.**—No action can be sustained against an executor or administrator as such on a penal statute; nor when the cause of action is founded upon any malfeasance or misfeasance, is a tort, or arises *ex delicto*, such as trespass, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, etc., when the complaint imputes a tort done to the person or goods of another by the testator or intestate.[6]

§ 435. **Administrator with Will Annexed.**—If the testator appoints an executor of his will, and the executor dies, and an administrator with the will annexed is appointed, the administrator with the will annexed, under the statutes of California, possesses all the powers conferred on the executor named in the will, and can sell the land devised if the executor could have sold it.[7]

§ 436. **Action for Use and Occupation against Executor.**—At the common law an executor has constructive possession of the decedent's goods from the time of his death, and may declare on his own possession "as executor," although in fact he never has had possession. Under the laws of California an administrator is vested with the right to the possession of the real estate of his intestate as well as to the personal prop-

[1] Bartlett v. Hatch, 17 Abb. Pr. 461.

[2] People v. Houghtaling, 7 Cal. 350.

[3] Whitaker v. Whitaker, 6 Johns. 112; Carter v. Phelps, 8 Id. 440.

[4] Curtis v. Bowrie, Adm'rs of, 2 McLean, 374.

[5] Worden v. Worthington, 2 Barb. 368; see Merritt v. Seaman, 6 N. Y. 168.

[6] 3 Williams on Ex., pp. 1728, 1729; People v. Gibbs, 9 Wend. 29; Eustace v. Johns, 38 Cal. 3.

[7] Kidwell v. Brummagim, 32 Cal. 436.

erty; and his duties and liabilities in respect thereto are therefore of the same general character. If the administrator occupies and uses premises belonging to his estate, he becomes at least the tenant of the estate, liable in any event for the value of its use and occupation; and if he makes a profit, he becomes liable for that also, at the election of the parties in interest; such is the law of his relation. If in this case the administrator sustains a loss, the loss is his, and the hardship is no greater than a like result in the case of any other tenant.[1]

CHAPTER V.

HUSBAND AND WIFE.

§ 437. Against Husband for Necessaries Furnished to Defendant's Family, without his Express Request, at a Reasonable Price.

Form No. 93.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., he furnished to Mary Smith, the wife of defendant, at her request, sundry articles of [food or clothing, etc.], to wit:

II. That the same were necessary to her maintenance, and suitable to her station in life.

III. That the same were reasonably worth ..... dollars.

IV. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 438. Against Husband for Goods Furnished to Wife.—To sue a husband for goods furnished to his wife, it should be alleged that the goods were sold and delivered to him. If she were authorized by the relationship, the nature and character of the goods, and his circumstances to buy them, they were in law sold to him; and averring they were sold to her states no cause against him, and such averments may be omitted as mere evidence and not ultimate facts.[2]

§ 439. The Same—Husband, when Liable.—If a husband fails or refuses to provide a support for his wife, the law authorizes her to purchase from others on the credit of her husband, whatever is necessary for her maintenance, and suitable

[1] Walls v. Walker, 37 Cal. 424. [2] Jacobs v. Scott, 53 Cal. 74.

to her station in life.[1] It is not necessary to allege that the wife acted as the husband's agent, or with his consent. In nine cases out of ten, these averments would be fictions of law, which must never be pleaded under the code. The husband is liable in the proper cases, although he had expressly forbidden the plaintiff to trust his wife.[2]

§ 440. **The Same—Husband, when not Liable.**—A wife who, without cause, and against her husband's will, refuses to live with him, can not bind him for necessaries to a third party, who knows that she is not living with her husband, and who sells to her without further inquiry.[3]

§ 441. **Against Husband and Wife for Goods Sold, for her Separate Estate.**

Form No. 94.[4]

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ....., 18..., at ....., the plaintiff sold and delivered to the defendant, A. B., who was then, and still is, the wife of the defendant, C. B., materials used for the building of a house for her, upon and for the benefit of her separate lands and premises, situated in the town of ....., in the county of ....., bounded and described as follows: [Describe the premises.]

II. That the said defendant, A. B., in consideration thereof, then and there promised the plaintiff that she would pay for the same ..... dollars, out of her separate property, and did agree and intend that the same should be paid for out of her separate property.

III. That said materials are reasonably worth the said sum of ..... dollars, and that no part thereof has been paid.

IV. That plaintiff further alleges, on information and belief, that the premises above mentioned and described, were, at and before the ..... day of ....., 18... [date of marriage], since have been, and now are, her sole and separate property, and the same are worth about ..... dollars.

Wherefore the plaintiff demands judgment.

1. That the separate property aforesaid be charged with the payment of the said sum of ..... dollars, with interest from ....., together with the costs of this action.

[1] Galland v. Galland, 38 Cal. 265.

[2] Kent's Com. 148; Sykes v. Halstead, 1 Sandf. 483; Cal. C. C., sec. 174.

[3] Brown v. Mudgett, 40 Vt. 68; Cal. Civil Code, sec. 175.

[4] This form is applicable to New York and some other states. The following, Form No. 95, is adapted to the practice in California.

2. That the said property be applied to the payment of the same.

3. That a trustee be appointed to take possession of her said separate property, and dispose of it, or of so much thereof as shall be necessary to satisfy the same.

§ 442. **Against Husband and Wife for Goods Sold to the Wife for her Separate Estate.**

Form No. 95.

[TITLE.]

The plaintiff complains of the defendants, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ....., 18..., at ....., the plaintiff sold and delivered to the defendant, A. B., who then was and still is the wife of C. B., at her request, materials used for the building of a house for her, upon and for the benefit of her separate lands and property.

II. That said materials were of the agreed price and value [or were reasonably worth the sum] of ..... dollars, and that no part thereof has been paid.

Wherefore the plaintiff demands judgment against the defendants for the said sum of ..... dollars, and interest thereon from the ..... day of ....., 18 ..., and costs of suit.

§ 443. **Charging Separate Estate.**—A complaint under the New York practice, which directly alleges that the note was given by her for the express purpose of charging her separate estate with its payment, is sufficient on demurrer.[1] So it seems a complaint seeking to charge the separate estate of the wife is bad, if it does not set forth the property and the nature of her interest.[2]

§ 444. **Common and Separate Property Equally Liable.**—The separate property of the wife, and the common property of both husband and wife, are equally liable for the debts of the wife contracted before marriage.[3] The statute changes the common-law rule on this subject. In an action against the husband and wife, on a sole debt of the wife contracted by her before marriage, a judgment may be rendered to be collected out of the common property of both husband and wife.[4]

§ 445. **Consideration.**—If the debt is contracted for the benefit of the wife, or of her estate, no allegation of an intent to

[1] Yale v. Dederer, 18 N. Y. 265; Francis v. Ross, 17 How. Pr. 561; Phillips v. Hagadon, 12 Id. 17.

[2] Mallory v. Vanderheyden, 3 Barb. Ch. 9; Dyett v. N. A. C. Co., 20 Wend. 570; Sexton v. Fleet, 6 Abb. Pr. 8.

[3] Van Maren v. Johnson, 15 Cal. 313.

[4] Vlautin v. Bumpus, 35 Cal. 214; see Civ. Code, c. 3, Husband and Wife, secs. 158, 167, 171.

charge it on the estate is necessary.[1] Thus where the wife executes a note, although as surety, such intent need not be averred; it is presumed from her signing an express contract in writing.[2] In New York, if the consideration were not for the benefit of the wife or her estate, this allegation is necessary.[3] The agreement charging her estate must be in writing; but this is not necessary to be alleged.[4]

§ 446. **Alleging Coverture.**—The fact of coverture has ceased to have any relation to the technical right of maintaining an action by a married woman in respect to her separate property, and the allegation of coverture in the complaint is not necessary.[5]

§ 447. **Demand and Form of Judgment.**—To charge the separate estate of a wife in an equitable action in New York, the demand must be as in this form.[6] But there is no difference in the form of judgment, though the execution is restricted.[7]

§ 448. **Estate must be Shown.**—The complaint must show what the estate is, and what is its value.[8] But such is not the practice in California; for in this state the complaint need not set out any separate property of the defendant, because the wife was liable *in personam* before coverture, and under our statute continues so after marriage.[9]

§ 449. **For Benefit of her Separate Lands.**—The weight of the decisions is, that the acts relative to the rights and liabilities of married women in New York, enlarged only the power of married women to hold and convey their separate estate, but did not operate to subject them to new remedies on their personal contracts.[10] Under the California code she may

[1] Yale v. Dederer, 18 N. Y. 273, 284. 285.

[2] Williams v. Urmston, 35 Ohio St. 296; Phillips v. Graves, 20 Id. 371; Avery v. Vansickle, 35 Id. 270; Lillard v. Turner, 16 B. Mon. 374; Dobbin v. Hubbard, 17 Ark. 189; Patton v. Kinsman, 17 Iowa, 428; Boarman v. Groves, 28 Miss. 280; During v. Boyle, 8 Kans. 525; Metropolitan Bank v. Taylor, 62 Mo. 338.

[3] Yale v. Dederer, 18 N. Y. 281.

[4] Yale v. Dederer, 22 N. Y. 450.

[5] Peters v. Fowler, 41 Barb 467.

[6] Cobine v. St. John, 12 How. Pr. 333; Coon v. Brook, 21 Barb. 546

[7] Laws New York, 1853. p. 1057. For form of complaint on a note indorsed by the wife, while sole, before the delivery of the note to the payee, see Sexton v. Fleet, 6 Abb. Pr. 8; S. C., 15 How Pr. 105.

[8] Sexton v. Fleet, 6 Abb. Pr. 9; S. C., 15 How. Pr. 106; Cobine v. St. John, 12 Id. 336.

[9] Bostic v. Love, 16 Cal. 69; see also Foote v. Morris, 12 N. Y. Leg. Obs. 61.

[10] Francis v. Ross, 17 How. Pr. 561; Gates v. Brower, 6 N. Y. (5 Seld. 205; Switzer v. Valentine, 4 Duer) 96; Cobine v. St. John, 12 How. Pr. 333; Coon v. Brook, 21 Barb. 546. For other modes of pleading, see Coster v. Isaacs, 16 Abb Pr. 328; Baldwin v. Kimmel, Id. 353; Young v. Gori, 13 Id. 13, note; Thompson v. Sargent, 15 Id. 452; Aitken v. Clark, 16 Id. 328, note.

make herself liable without specially charging her separate estate.[1]

§ 450. **Homestead.**—A complaint by husband and wife to recover the homestead conveyed away by the deed of the husband alone, must aver either that the premises were occupied as a homestead at the date of the conveyance, or that they had not been previously abandoned.[2] So a married woman can not alone convey away the homestead.[3]

§ 451. **Marriage.**—A marriage *de facto*, although not legally solemnized, is sufficient at common law to render the husband liable for the previously contracted debts of the wife.[4] It is not material whether the marriage was solemnized, if the parties afterwards, and after the passage of the act, resided and acquired the property here.[5]

§ 452. **Misjoinder of Causes of Action.**—Claim for personal judgment against husband, and enforcement of a lien against wife's separate estate, are incompatible.[6]

§ 453. **Promise of Married Woman.**—In New York, in an action to charge the separate estate of a married woman upon her promise, it is necessary that the complaint allege either that the consideration of the promise was for the benefit of the estate, or that she intended to charge such estate.[7]

§ 454. **Property Liable for Debts of Wife.**—The separate property of the wife is liable for her debts contracted before marriage, and the separate property of her husband is not.[8] The interest of the wife in the common property is a mere expectancy, like the interest which an heir may possess in the property of his ancestors.[9]

§ 455. **The Same—Property Owned before Marriage.**—The complaint is not demurrable for omitting to designate the wife's separate property, which by the statute law of New York, 1853, is alone bound by the judgment in such case.[10]

§ 456. **Rent.**—Where husband and wife are sued for rent claimed on a lease made by plaintiff to the wife, plaintiff and

[1] See chapter 3, Civil Code.
[2] Harper v. Forbes, 15 Cal. 202.
[3] Poole v. Gerard, 6 Cal. 73.
[4] Norwood v. Stevenson, Andr. 227, 228; Robinson v. Nahon, 1 Camp. 245; Watson v. Threlkeld, 2 Esp. 637.
[5] Dye v. Dye, 11 Cal. 163; see People v. Anderson, 26 Id. 129; Graham v. Bennett, 2 Id. 503; Letters v. Cady, 10 Id. 533.
[6] Palen v. Lent, 5 Bosw. 713; Sexton v. Fleet, 2 Hilt. 477.
[7] Palen v. Lent, 5 Bosw. 713; Francis v. Ross, 17 How. Pr. 561.
[8] Cal. Civil Code, sec. 170; Van Maren v. Johnson, 15 Cal. 311; Vanderheyden v. Mallory, 1 Comst. 172.
[9] Van Maren v. Johnson, 15 Cal. 311; Guice v. Lawrence, 2 La. An. 226; see also Packard v. Arellanes, 17 Cal. 587; Vlantin v. Bumpus, 35 Id. 214.
[10] Foote v. Morris, 12 N. Y. Leg. Obs. 61.

the wife being tenants in common of the property, it was held, that the wife can be liable only as sole trader under the statute; and that the complaint must aver facts requisite to establish her liability in that character, and that the allegation that she "was doing business as a *feme sole*, with the consent of her husband," is insufficient.[1]

§ 457. **Sale and Delivery.**—The complaint must allege a sale for the benefit of such estate.[2] Alleging a sale and delivery to the husband, instead of alleging a sale and delivery to the wife on the faith of or for the benefit of her separate estate, is not sufficient.[3] Merely alleging a sale on the credit of her estate, is insufficient on demurrer.[4]

§ 458. **Separate Property.**—In an action against husband and wife to recover antenuptial debts, the complaint need not designate wife's separate property.[5] Where the complaint does not aver that the purchase-money paid for land bought in the name of the wife was her separate property, the presumption is that it is common property.[6]

§ 459. **Sufficient Averment.**—Where the complaint in an action upon the contract of a married woman alleged that the property sold was for the use and benefit of the wife, that it was purchased at her special instance and request, and used in and about her premises, it is a sufficient averment of a contract made with the wife in relation to her separate property.[7]

§ 460. **Against Husband and Wife on Note by Wife while Sole.**

Form No. 96.

[TITLE.]

The plaintiff complains of the said C. D. and E., his wife, the defendants, for that the said E., heretofore, whilst she was sole and unmarried, on the ..... day of ....., 18..., at [place of date], made her certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff, and thereby promised, by her then name of E. F., to pay to the said plaintiff, or order, the sum of $ ..... in ..... after the date thereof; and the said E. F., has since intermarried with the said C. D.; yet the said defendants have not, nor hath either of them, paid the said sum of money, or any part thereof, to the said plaintiff.

[1] Aiken v. Davis, 17 Cal. 119.
[2] Bass v. Bean, 16 How. Pr. 93.
[3] Arnold v. Rignold, 16 How. Pr. 158.
[4] Bass v. Bean, 16 How. Pr. 93.
[5] Foote v. Morris, 12 N. Y. Leg. Obs. 61.
[6] Althof v. Conheim, 38 Cal. 230.
[7] Musser v. Hobart, 14 Iowa, 248.

Wherefore the said plaintiff prays judgment against the said defendants for the said sum of $ ....., together with interest thereon from the ..... day of ....., 18..., and costs of suit.

§ 461. **By a Married Woman.**

Form No. 97.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff intermarried with one A. B., whose wife she now is.

II. That on the ..... day of ....., 18..., at .. .., the defendant made his promissory note payable to the plaintiff for the sum of ..... dollars, and which note is in words and figures as follows: [Copy note.]

III. That the consideration of the said note was the payment by this plaintiff to the maker thereof of the sum of ..... dollars, which said sum was at and before the time of her marriage owned by her, and thereafter was her sole and separate property, and so continued until the date the said note became due, and that said note thereupon became and ever since has remained her sole and separate property [or otherwise, according to the circumstances, showing it to be her separate estate].

[DEMAND OF JUDGMENT.]

§ 462. **Division of Common Property.**—In an action for the division of the common property of husband and wife, after a decree of divorce, the plaintiff, to bring herself within the provisions of the act "defining the rights of husband and wife," passed April 17, 1850, must affirmatively state such facts as give her the right to the property under the act.[1]

§ 463. **Marriage, Averment of.**—Where the plaintiff averred in her complaint, in a suit brought for her distributive share of the estate of an alleged deceased husband, that the deceased made proposals of marriage to her, when she accepted, and consented to live with him as his true and lawful wife; and that in accordance with his wishes she henceforth lived and cohabited with him as his wife, always conducting herself as a true, faithful, and affectionate wife should do, it was held that these were insufficient averments of the existence of a marriage, and that the facts averred were only *prima facie* evidence of a marriage.[2]

§ 464. **Mortgage.**—It is immaterial whether a conveyance to the wife was made with or without a fraudulent intent; in

[1] Dye v. Dye, 11 Cal. 163; see Johnson v. Johnson, Id. 200.
[2] Letters v. Cady, 10 Cal. 533; see People v. Anderson, 26 Id. 129.

either case it is unavailing against the mortgage, because the inference from the language of the complaint that the conveyance was upon purchase and during marriage, and consequently, that the property was common property, is not negatived by any averment that the property was transferred to her before marriage, or was a gift to her, or in exchange for her separate property.[1]

§ 465. **Mortgage of Separate Property.**—Where a wife sought relief by a bill in chancery from a mortgage of her separate property, it was no objection to the bill, as a rule of pleading, that a husband was made a party to it with the wife. He acts only as her *prochein ami*.[2]

§ 466. **Separate Property of Wife.**—The law of California provides that all property owned by the wife before her marriage, or after marriage, acquired by gift, bequest, devise, or descent, shall be her separate estate;[3] the law in this respect being similar to that of Texas and Louisiana.[4] A general averment that the property is the separate property of the married woman, is not bad on demurrer.[5]

§ 467. **Services of Wife before Marriage.**—The husband is properly joined with the wife in an action for services performed by her, and the action brought therefor, previous to marriage.[6]

§ 468. **When Husband may Join.**—When a married woman is a party, her husband must be joined with her, except in special cases.[7] And even in these special cases it is not obligatory on the wife to sue alone.[8]

§ 469. **When She may Sue Alone.**—In actions concerning her separate estate, she may sue alone, as if she were a *feme sole*.[9] So in Illinois, under the act of 1861, p. 24.[10] So, also, in New York, under the code of procedure, section 114. Under the new code of procedure in New York, section 450, a married woman appears, prosecutes, or defends alone or joined with other parties, as if she were single. So, also, by the laws of Pennsylvania.[11] So, also, under the laws of

[1] Kohner v. Ashenauer, 17 Cal. 578.
[2] Bein v. Heath, 6 How. U. S. 228.
[3] Civil Code, sec. 162; Meyer v. Kinzer, 12 Cal. 251; Smith v. Smith, Id. 224.
[4] Huston v. Curl, 8 Tex. 242; Chapman v. Allen, 15 Id. 278; Claiborne v. Tanner, 18 Id. 69; Dominguez v. Lee, 17 La. 290; Fisher v. Gordy, 2 La. An. 763; Webb v. Peet, 7 Id. 92.
[5] Spies v. Accessory Transit Co., 5 Duer, 662; Lippman v. Petersburgh, 10 Abb. Pr. 254.
[6] Van Maren v. Johnson, 15 Cal. 310.
[7] Code C. P., sec. 370.
[8] Van Maren v. Jonhson, 15 Cal. 310.
[9] Code C. P., sec. 370.
[10] See Emerson v. Clayton, 32 Ill. 493.
[11] See Goodyear v. Pumbaugh, 18 Pa. St. 480; Cummings' App., 11 Id. 275; Sheidle v. Weisblee, 14 Id. 134; Long's Adm'r v. White's Adm'r, 5 J. J. Marsh. 230.

Texas.[1] A married woman may sue alone in actions against her husband.[2]

§ 470. **When She can not Sue Alone.**—The wife can not bring suit in her own name on a contract which the law does not authorize her to make.[3] Nor to recover the homestead.[4] Nor for damages for a personal injury.[5] The question of the rights of married women is regulated by the statutes of the several states. Hence the authorities referred to have little application, except in the states where such laws are in force, or the decisions were made. In Illinois, whenever a wife joins with her husband, her interest must appear.[6]

§ 471. **Against a Married Woman, as Sole Trader.**

Form No. 98.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is the wife of one A. B.

II. That on the ..... day of ....., by a decree of the county court of the county of ....., in this state, the defendant was decreed a sole trader; and at the time of making the note hereafter mentioned, the defendant was, and still is, a sole trader, carrying on business as ..... at .....

III. That on the ..... day of ....., 18..., at ....., the plaintiff sold and delivered to the defendant, at her request ..... of the value of ..... dollars, which were used by the defendant in her said business, as sole trader.

IV. That in consideration thereof, the defendant, as sole trader, made her promissory note, of which the following is a copy. [Copy note.]

V. That she has not paid the same.

[DEMAND OF JUDGMENT.]

§ 472. **Separate Property.**—The letters received by a married woman from her first and second husband, before her marriage with the latter, are her separate property—like jewels—and her gift of them to her daughter is valid as against her husband.[7]

§ 473. **Sole Trader.**—A complaint, in an action to recover a debt from a married woman, which charges that she is a sole trader under the statute, is sufficient, without any averment of facts showing that the debt was contracted in the

[1] McIntire v. Chappell, 2 Tex. 378; O'Brien v. Hilburn, 9 Id. 297.
[2] Kashaw v. Kashaw, 3 Cal. 312.
[3] Snyder v. Webb, 3 Cal. 83.
[4] Poole v. Gerrard, 6 Cal. 71; Guiod v. Guiod, 14 Id. 505; but see California Code Civil Procedure, sec. 370, subd. 1.
[5] Sheldon v. Uncle Sam, 18 Cal. 526.
[6] 2 Black. 1236.
[7] Grigsby v. Breckinridge, 2 Bush, 480.

particular business which she had declared her intention to carry on.[1]

§ 474. **Sole Trader, Averment of.**—An averment in the complaint that the defendant, a married woman, who carried on a separate business, represented at the time of making the contract that it was for the use of such business, is sufficient on demurrer.[2] If the contract was not in fact for the uses of such business, it should appear by way of defense.[3]

§ 475. **The Same, on Contract Generally.**

Form No. 99.

[TITLE.]

The plaintiff complains, and alleges:

I. [State marriage as in previous form.]

II. [State cause of action.]

III. That the property hereinbefore mentioned was acquired by her as sole trader, and has ever since been her sole property.

[DEMAND OF JUDGMENT.]

§ 476. **Facts to be Alleged.**—By the decisions of the courts in New York, it seems that it is still necessary, in an action against a married woman, to allege in the complaint the facts creating her peculiar liability, for an act relating to her separate estate, or relating to trade carried on by her for her own benefit.[4]

CHAPTER VI.

INFANTS.

§ 477. **By an Infant, Suing by General Guardian.**

Form No. 100.

[TITLE.]

A. B., an Infant, by C. D., his Guardian, Plaintiff,
against
E. F., Defendant.

The plaintiff complains, and alleges:

I. That he is under the age of twenty-one years.

II. That on the ..... day of ....., 18..., at ....., the above-named C. D. was duly appointed by the .....

[1] Melcher v. Kuhland, 22 Cal. 523.

[2] Coster v. Isaacs, 16 Abb. Pr. 328.

[3] Coster v. Isaacs, 16 Abb. Pr. 328. For the substance of a complaint against a married woman as sole trader, see Goulding v. Davidson, 26 N. Y. 604; and, less fully, Id., 25 How. Pr. 483.

[4] Dickerman v. Abrahams, 21 Barb. 551; Baldwin v. Kimmel, 16 Abb. Pr. 353.

court of the ..... county, state of California, guardian of the property and person of the plaintiff.

III. [State the cause of action.]

[DEMAND OF JUDGMENT.]

§ 478. **By an Infant, Suing by Guardian ad Litem.**

Form No. 101.

[TITLE.]

A. B., an Infant, by C. D., his Guardian *ad litem*, Plaintiff, *against* E. F., Defendant.

The plaintiff complains, and alleges:

I. That he is under the age of twenty-one years, to wit, of the age of ..... years.

II. That on the ..... day of....., 18..., at ....., the above-named C. D. was duly appointed by the ..... court of the county of ....., state of California, the guardian of the above-named A. B., for the purposes of this action.

III. [State the cause of action.]

[DEMAND OF JUDGMENT.]

§ 479. **Actions by or against Infants** should be brought in the name of their general guardian, or by their guardian *ad litem*.[1]

§ 480. **Appointment of Guardian.**—Where the will appoints a guardian, there is no necessity for any letters of guardianship.[2] The court has no right to appoint a guardian *ad litem*, for an infant defendant, till the defendant is properly brought before the court.[3] But where his interests require it, the court will appoint such a guardian even though the minor may have a general guardian.[4] The provisions of sections 9 and 10 of the California Civil Practice Act (Code, 372, 373), relative to the appointment of guardians *ad litem*, where infants are parties, only apply where there is no general guardian, or where he does not act.[5]

§ 481. **Appointment, how and when must be Alleged.** In New York, where the plaintiff is an infant suing by guardian, the complaint shall contain an allegation of the appointment of the guardian, and it should be stated in a traversable form.[6] Such appointment must be alleged with certainty as to

[1] Cal. Code Civ. Proc., sec. 372; N. Y. Code (1877), sec. 469.

[2] Norris v. Harris, 15 Cal. 255.

[3] Gray v. Palmer, 9 Cal. 616.

[4] Gronfier v. Puymirol, 19 Cal 929; Emeric v. Alvarado, 1 West Coast Rep. 708.

[5] Fox v. Minor, 32 Cal. 119; Spear v. Ward, 20 Id. 676.

[6] Hulbert v. Young, 13 How. Pr. 414; Grantman v. Thrall, 44 Barb. 173; see also Stanley v. Chappell, 8 Cow. 235.

time, place, and power of the appointment.[1] But an allegation that the appointment was made on the plaintiff's application is implied by the averment that the guardian was "duly appointed."[2] When, however, a complaint was entitled, "J. G., by J. G., his Guardian, v. G. T.," and commenced thus: "The plaintiff, complaining, states," etc., but contained no allegation that the plaintiff was an infant, under the age of twenty-one years, or that the guardian was appointed by any court, it was held bad on demurrer, for the reason that, while it showed that the plaintiff appeared by guardian, it did not show that the guardian was duly appointed, so as to authorize such appearance.[3] If the allegation be deemed too general, the objection can not be taken by demurrer. The remedy is by motion to make it more definite.[4]

In California, however, in an action against infants, neither the petition for the appointment of a guardian *ad litem*, nor the order making the same, need appear on the judgment roll. Such appointment may be made on an application *ore tenus* in open court, as well as in writing, and where the record is silent as to the manner of appointment, the regularity thereof will be presumed.[5]

§ 482. **Actions by General Guardian.**—A general guardian can not sue in his own name to recover money due the infant. Such actions must be brought in the name of the infant, by his guardian.[6] In an action by an infant, a general guardian, designated in the complaint as a guardian *ad litem*, is of no importance, if the body of the complaint shows him to be a general guardian.[7] In an action by a guardian, to recover from his ward's estate for services rendered in a suit at law, it must be alleged that the employment of the plaintiff was a reasonable and proper expense incurred by the guardian.[8]

§ 483. **Disaffirmance of Deed.**—Where an infant conveys his land, and afterwards, on coming of age, would avoid the deed and recover possession, he must before suit make an entry upon the lands, and execute a second deed to a third person, or do some other act of equal notoriety in disaffirmance of the

[1] Stanley v. Chappell, 8 Cow. 235; Hulbert v. Young, 13 How. Pr. 413.

[2] Polly v. Saratoga and Washington R. R. Co., 9 Barb. 449; People ex rel. Haws v. Walker, 2 Abb. Pr. 421; People ex rel. Crane v. Ryder, 12 N. Y. 433.

[3] Stanley v. Chappell, 8 Cow. 235; Hulbert v. Young, 13 How. Pr. 413; Grantman v. Thrall, 44 Barb. 173.

[4] Séré v. Coit, 5 Abb. Pr. 481.

[5] Emeric v. Alvarado, 1 West Coast Rep. 708.

[6] Spear v. Ward, 20 Cal. 676; Fox v. Minor, 32 Id. 119.

[7] Spear v. Ward, 20 Cal. 676.

[8] Caldwell v. Young, 21 Tex. 800.

first deed, or an action can not be maintained.[1] His act of disaffirmance must be averred in the pleading, and is necessary to be proved. The want of this allegation makes the complaint fatally defective.[2]

§ 484. **Infant Feme Covert.**—Under the California statutes, the disability of infancy attaches as well to a *feme covert* under age, as to a *feme sole*, subject to the act of 1858, p. 108, which makes married women under eighteen, and married with the consent of their parent or guardian, of full and lawful age.[3]

§ 485. **Actions by Infants in Ohio and Illinois.**—In Illinois minors may bring suits in all cases whatever, by persons they may select as their next friend, who must file a bond for costs that may accrue.[4] In Ohio the action must be brought by the guardian or next friend of the infant,[5] who is liable for all costs [6] In a joint suit by husband of age, and wife a minor, no guardian for the wife is necessary.[7]

§ 486. **Partition.**—Guardians *ad litem* appointed to represent an infant in suits in partition, have no power to admit away by their answer the rights of the infants, as it is not a matter within the scope of their appointment.[8] They have power to defend for the infant solely against the claim set up for partition of the common estate.[9]

§ 487. **Promissory Notes.**—The promissory note of an infant is voidable, not void.[10]

§ 488. **Special Obligation of Ancestor.**—Where the infant was sued upon a special obligation of the ancestor, chargeable upon the inheritance, he might pray that the proceedings be stayed until he should attain his majority. This privilege is confined to the heir alone.[11] In Ohio it is held that in an action against an infant for the specific performance of an alleged contract with his ancestor, he is entitled to a day in court after coming of age to show cause against the decree, and if an absolute decree be taken against him, it will be error.[12] In the same

[1] Bool v. Mix, 17 Wend. 119; Dominick v. Michael, 4 Sandf. 420.

[2] Voorhies v. Voorhies, 24 Barb. 150. See, also, Civil Code, secs. 35, 36, and 37. As to what acts will amount to affirmance, see Henry v. Root, 33 N. Y. 526.

[3] Magee v. Welsh, 18 Cal. 155. This statute is not now in force. As to disaffirmance of deed by infant, see 5 Ohio, 251.

[4] Scates, Treat. and Stat. 552.

[5] Ohio Code, sec. 30.

[6] Ohio Code, sec. 31.

[7] Cook v. Rawdon, 6 How. Pr. 233; Hulbert v. Newell, 4 Id. 93.

[8] Waterman v. Lawrence, 19 Cal. 210.

[9] Id.

[10] Young v. Bell, 1 Cranch C. Ct. 342; Tucker v. Moreland, 10 Pet. U. S. 58.

[11] Joyce v. McAvoy, 31 Cal. 273.

[12] Long v. Mulford, 17 Ohio St. 485.

case, it was held that the right of parol demurrer, or staying proceedings until the infant attained his majority, was abolished by statute; but that the right of the infant to a day in court after coming of age does not depend upon the existence or non-existence of the right of parol demurrer.

§ 489. **Trover.**—Infancy is no bar to an action of trover for conversion of goods.[1]

§ 490. **Wages.**—An infant, after the death of his father, can not recover his wages for services performed in the life-time of his father, under a contract made with the father.[2]

§ 491. **Wrongs.**—Infancy is no defense to an action founded on fraud and falsehood of the party pleading it.[3]

CHAPTER VII.

INSANE PERSONS.

§ 492. By Guardian of an Insane Person, or Person of Unsound Mind.

Form No. 102.

[TITLE.]

C. D., an Insane Person [or Person of Unsound Mind], by A. B., his Guardian, Plaintiff,
against
E. F., Defendant.

The plaintiff complains, and alleges:

I. [State the cause of action.]

II. That on the .. .. day of ....., 18...., at the county of ....., the superior judge of said county [or city and county], state of California, upon the petition of ....., and after due notice and hearing, adjudged the said C. D. to be an insane person [or incapable of taking care of himself and managing his property].

III. That afterward on the same day [or on the ..... day of ....., 18...], at said county [or city and county], said superior judge [or court], appointed the plaintiff guardian of the person and estate of the said C. D.; that he, this plaintiff, has given bond as required by law, and still and now is such guardian of the said C. D., as aforesaid.

[DEMAND OF JUDGMENT.]

§ 493. **Appointment of Guardian.**—Upon petition under

[1] Vasse v. Smith, 6 Cranch, 226; Fish v. Ferris, 5 Duer, 49; Schunemann v. Paralise, 46 How. Pr. 426.

[2] Roby v. Lyndall, 4 Cranch C. Ct. 351.

[3] Catts v. Phalen, 2 How. Pr. 376; see California Civil Code, sec. 41.

oath, by any relative or friend of any insane person, or any person who by old age or other cause is mentally incompetent, the probate judge shall, after hearing and examination, appoint a guardian of his person and estate.[1] And every such guardian shall appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose, as guardian or next friend.[2]

§ 494. **"Duly Appointed."**—The word "duly," as used in the New York forms, may be omitted, as jurisdiction of the probate court will be presumed.[3]

§ 495. **Limitations.**—The probate of a will shall be conclusive, if not contested within one year, but in the case of infants, married women and persons of unsound mind alike, a period of one year, after their respective disabilities are removed is granted by the probate act.[4]

§ 496. **Attack on Authority of Guardian.**—Letters of guardianship of an insane person can not be questioned in a collateral proceeding, and are admissible in evidence.[5]

§ 497. **Against the Guardian of an Insane Person.**

Form No. 103.

[TITLE.]

A. B., Plaintiff,
against
C. D., Guardian of E. F., an Insane Person [or Person of Unsound Mind], Defendant.

The plaintiff complains, and alleges:

I. [State a cause of action against an insane person.]

II. That afterwards [or on the ..... day of ....., 18...], the said E. F., was adjudged by the ..... court to be a person of unsound mind.

III. That the defendant was, on the ..... day of ....., 18 ..., appointed by the said court guardian of the person and estate of the said E. F., that he, the defendant, accepted said appointment, and is now such guardian.

Wherefore the plaintiff demands judgment for ..... dollars, with interest from ..... to be paid out of the estate of the said E. F., in the hands of the defendant.

§ 498. **Ejectment.**—The guardian of a lunatic, etc., has no estate in his lands; and an action of ejectment for the lunatic's land must be brought in the lunatic's name.[6]

[1] California Code C. P. sec. 1764.
[2] Cal. Code C. P., sec. 1769.
[3] See Bloom v. Burdick, 1 Hill, 130. As to presumption of jurisdiction, see "Jurisdiction," c. 2.
[4] Cal. Code C. P., sec. 1338.
[5] Warner v. Wilson, 4 Cal. 310.
[6] Petrie v. Shoemaker, 24 Wend. 85. For a history of the judical custody of lunatics, see Brown's Case, 1 Abb. Pr. 108; S. C., 4 Duer, 613.

§ 499. **Equity Suits.**—If any person has a legal or equitable claim against the estate of an insane person, which is under the care of the guardian, who refuses to allow the same, he must apply to chancery by petition. He will not be permitted to sue at law except under the sanction of chancery.[1]

§ 500. **Habitual Drunkard.**—In New York, where, pending a suit brought by a creditor to reach the assets of his debtor, the latter is, by proceedings previously commenced in another court, adjudged to be an habitual drunkard, and a committee is appointed of his estate, the court in which the former suit is pending can not properly proceed to final judgment.[2] The rules of comity always observed toward each other by courts of concurrent jurisdiction, would prevent the granting of a decree as prayed for.[3]

§ 501. **Lunatic.**—A suit in equity for the benefit of a lunatic must be brought in his own name.[4]

§ 502. **Necessary Averment.**—A complaint against the guardian of an habitual drunkard must state with particularity the court and authority by which the debtor was declared an habitual drunkard.[5]

§ 503. **Personal Actions.**—And there is no distinction between actions concerning his realty and those relating to his personal estate, since all actions must be brought in the name of the lunatic.[6] In Alabama, a person may sue an adult lunatic for necessaries furnished him, and is entitled to proceed in the case upon the appointment of an attorney for the defendant, although there is no guardian *ad litem*.[7]

[1] Matter of Heller, 3 Paige, 199; Brasher v. Van Cortlandt, 2 Johns. Ch. 242; Williams v. Estate of Cameron, 26 Barb. 172.

[2] In re Helle, 3 Paige Ch. 199; Clarke v. Dunham, 4 Den. 262; In re Hopper, 5 Paige Ch. 489; Robertson v. Lain, 9 Wend. 649.

[3] Niblo v. Harrison, 9 Bosw. 668.

[4] McKillip v. McKillip, 8 Barb 552; Lane v. Schermerhorn, 1 Hill, 97; Petrie v. Shoemaker, 24 Wend. 85; Davis v. Carpenter, 12 How. Pr. 287; Re McLaughlin, Clarke's Ch. 118.

[5] Hall v. Taylor, 8 How. Pr. 428.

[6] Lane v. Schermerhorn, 1 Hill, 97; McKillip v. McKillip, 8 Barb. 552.

[7] Ex parte Northington, 37 Ala. 496.

CHAPTER VIII.

PARTNERS.

§ 504. Title and Commencement of Complaint by Partners.

Form No. 104.

[TITLE.]

A. B. and C. D., Partners, under the firm name of "A. B. & Co.," Plaintiffs,
against
E. F. and G. H., Partners, under the firm name of "E. F. & Co.," Defendants.

A. B. and C. D., the plaintiffs in the above-entitled action, complain of E. F. and G. H., partners, under the firm name of "E. F. & Co.," and allege:

I. [State cause of action.]

[DEMAND OF JUDGMENT.]

§ 505. **Actions between Partners.**—As a general rule, no action at law can be maintained between partners, pending the relation as such,[1] although a stipulation by one, for the benefit of the others, may be enforced by them or their trustees, as against a limited partner.[2] They can not sue one another for any of the business or undertakings of the firm.[3] They can only ask for a dissolution and an accounting. One partner can not sustain an action against his copartner for the delivery of personal property belonging to the copartnership.[4] But one partner may sue his copartner on a note.[5] Or one partner may sue another at law for damages caused by a premature dissolution on breach of copartnership articles,[6] and after division of a specific fund he may sue for his allotted portion.[7] So, one partnership firm may sue another, having a mutual partner, for an ascertained balance,[8] and such mutual partner may elect whether to be plaintiff or defendant in the action.

§ 506. **Authority of Partner.**—In California a partner can not make an assignment of the partnership property to a creditor, or in trust for creditors, nor dispose of the good-will of the

[1] Koningsburg v. Launitz, 1 E. D. Smith, 215.
[2] Robinson v. McIntosh, 3 E. D. Smith, 221.
[3] Buckley v. Carlisle, 2 Cal. 420; Stone v. Fouse, 3 Id. 292; Barnstead v. Empire Min. Co., 5 Id. 300; Koningsburg v. Launitz, 1 E. D. Smith, 215; but see Robinson v. McIntosh, 3 Id. 221.
[4] Buckley v. Carlisle, 2 Cal. 420.
[5] Van Ness v. Forrest, 8 Cranch, 30.
[6] Bagley v. Smith, 6 Seld. 489.
[7] Crosby v. Nichols, 3 Bosw. 450; Ross v. Cornell, 45 Cal. 133.
[8] Cole v. Reynolds, 18 N. Y. 74.

business, nor dispose of the whole of the partnership property at once, unless it consists entirely of merchandise, nor do any act which would make it impossible to carry on the ordinary business of the partnership, nor confess a judgment, nor submit a partnership claim to arbitration, unless his copartners have wholly abandoned the business to him, or are incapable of acting.[1] Nor can one member of a partnership bind his copartner by a promissory note for a partnership demand, made after the dissolution of the partnership.[2]

§ 507. **Arbitration.**—In Vermont it was held that a partner has not authority, as such, to submit partnership matters to arbitration, so as to make the award binding on the firm.[3] A partner may submit his own interest in the firm to reference, but he can not thereby bind the other partners.[4]

§ 508. **Individual Interest** —The interest of a copartnership can not be given in evidence on an averment of individual interest; nor an averment of copartnership interest be supported by a special individual contract.[5]

§ 509. **Joint Assumpsit.**—Where suit is brought on a partnership transaction, the complaint stating a contract with the partner sued, evidence may be given of a joint *assumpsit*.[6]

§ 510. **Judgment Against Partners—Service on One.**—A partnership consisting of several persons must sue or be sued by their names at length, and not in the name of the firm.[7] Such is the common-law rule; but, "when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their joint liability," is the form of a provision found in the California Code of Civil Procedure. Similar provisions exist in the codes or statutes of many of the states. The supreme court of the United States has refused to give a judgment thus obtained against a partner not served with process any extra territorial force, on the ground that the judgment was obtained without

[1] Civil Code, sec. 2430.
[2] Curry v. White, 51 Cal. 530; see also Stokes v. Stevens, 40 Id. 391.
[3] Martin v. Thrasher, 40 Vt. 460.
[4] Karthaus v. Ferrer, 1 Pet. 222; see also Lyle v. Rodgers, 5 Wheat. 394.
[5] Graves v. Boston Mar. Ins. Co., 2 Cranch, 215.
[6] Barry v. Foyles, 1 Pet. U. S. 311.
[7] Bentley v. Smith, 3 Cal. 170.

due process of law.[1] In several states the validity of such a judgment has been either tacitly assented to, or expressly upheld by the courts.[2] In California, the earlier cases upheld the constitutionality of such a judgment,[3] but this position has been since receded from, and such judgments, at least as against the partner not served, are considered void.[4]

§ 511. **Liability of Partners.**—The whole of the partners are liable on a warranty by one of the members, on sale of firm

[1] Mason v. Eldred, 6 Wall. 239; Public Works v. Columbia College, 17 Id. 527; D'Arcy v. Ketchum, 11 How. 165; Phelps v. Brewer, 9 Cush. 390; Hall v. Lanning, 91 U. S. 160.

[2] Johnson v. Lough, 22 Minn. 203; Lahey v. Kingon, 13 Abb. Pr. 192; Harper v. Brink, 24 N. J. L. 333; Martin v. Rising, 2 Pac. C. L. J. 56; Guimond v. Nast, 44 Tex. 114; Kidd v. Brown, 2 How. Pr. 20; Whitmore v. Shiverick, 3 Nev. 288.

[3] Welsh v. Kirkpatrick, 30 Cal. 203.

[4] Tay v. Hawley, 39 Cal. 95. In this case the court, per Rhodes, J., said: "The statute provides that the 'joint property' of all the defendants may be taken in execution for the satisfaction of the judgment; but none of the cases in this court defines such joint property. * * * In Mason v. Denison, 15 Wend. 64, it is said that the term applies to the property which one defendant might apply to the satisfaction of the debt, without consulting his co-contractor. Accepting the restriction indicated in that case, or even limiting the meaning of 'joint property' to partnership property of the persons alleged to be joint debtors, we are utterly unable to see how a judgment that is to be enforced against the interest in such property of a person who has not been served with process, and has not appeared, can be maintained. It is a cardinal principle of jurisprudence that a judgment shall not bind or conclude a man, either in respect to his person or property, unless he has had his day in court. No person shall be deprived of life, liberty, or property without due process of law, says the constitution: but this principle is older than written constitutions, and without invoking the constitutional declaration, every person may, as a matter of common right, insist that he be heard in his own defense before judgment passes which binds, charges, or injuriously affects his person or estate. It is no answer to say that the judgment affects only the joint property of the defendants—property that either of the debtors might apply to the satisfaction of the common debt—for that assumes that the defendants are joint debtors, and that may be to the defendant who is not served the vital point of the controversy. He may be ready to admit every allegation of the complaint, except that he is a party to the contract; or he may even admit the contract, and yet be ready, if an opportunity were presented, to make a successful defense on the ground of fraud, failure of consideration, payment, accord and satisfaction, etc. The defendant who is served may be ignorant of the defenses upon which his co-defendants would rely, or he may, either negligently or purposely, omit to present them. And whatever his answer may be, he only answers for himself; and there is nothing in the law regulating the acquisition or disposition of joint property, which confers upon one joint owner the right to defend actions for his fellows. Unless it can be shown that such property is under the ban of the law, a judgment which subjects to execution the interest of a person who has had no opportunity to be heard in the action, can not be upheld without violating principles which lie at the base of all judicial proceedings." In the latter part of this opinion the judge stated that the provisions of the code, which provide for summoning a defendant who had not originally been served, to show cause why he should not be bound by the judgment, furnish the exclusive mode by which he can be bound by the judgment, and such provisions necessarily imply that he is not already bound."

property.[1] One partner is liable to third parties for injuries occasioned by negligence of another.[2] All are liable for the fraud of one.[3]

§ 512. **Partnership, what Contitutes.**—Actual intention is necessary to constitute a partnership *inter se*. There must be a joint undertaking to share in the profit and loss. Each party must, by the agreement, in some way participate in the losses as well as the profits.[4] An agreement to divide the gross earnings does not constitute the parties to it partners.[5] A partnership may exist as to third persons, when there is no partnership as between the persons thus liable.[6]

§ 513. **Partnership Property.**—The plaintiff must recover on the allegations in his complaint, if at all, and if the complaint fails to aver that the property was partnership property, the judgment of the court should not find that fact.[7]

§ 514. **Special Partner.**—In California, the general partners may sue and be sued alone, in the same manner as if there were no special partners.[8]

§ 515. **Suit for Dissolution and Accounting.**

Form No. 105.

[TITLE.]

The plaintiff complains of the defendant, and alleges:

I. That on or about the ..... day of ....., 18...., the plaintiff and defendant, at ...., entered into and formed a copartnership for the purpose of [state nature of business], under the firm name and style of ....., and that they thereafter entered upon and continued to transact such copartnership business under their firm name.

II. That since the commencement of said copartnership, the defendant has wrongfully, and without the assent of the plaintiff, applied some of the money or receipts and profits of their said business to his own use, and by reason thereof has become indebted to said copartnership, and impeded and injured the business thereof.

III. That the plaintiff has repeatedly requested the defendant to pay said copartnership the money so received by

[1] Sweet v. Bradley, 21 Barb. 549.
[2] Cotter v. Bettner, 1 Bosw. 490.
[3] Getty v. Devlin, 54 N. Y. 403.
[4] 2 Kent's Com. 23–28 Hazard v. Hazard, 1 Story 373; Denny v. Cabot, 6 Met. 82; Muzzy v. Whitney, 10 Johns. 228; Champion v. Bostwick, 18 Wend. 181; Smith v. Moynihan, 44 Cal. 53; Wheeler v. Farmer, 38 Id. 203.
[5] Pattison v. Blanchard, 1 Seld. 191; Story on Part., sec. 34, and cases cited in note 3; Wheeler v. Farmer, *supra*.
[6] See Ontario Bank v. Hennessey, 48 N. Y. 545; Manhattan Brass & Mfg. Co. v. Sears, 45 Id. 797; McStea v. Matthews, 50 Id. 166.
[7] Sterling v. Hanson, 1 Cal. 480.
[8] Civil Code, sec. 2492.

him and misappropriated as aforesaid, or to account to said firm therefor, but that the defendant has heretofore neglected and refused, and still does neglect and refuse, so to account, and has threatened to continue to collect the copartnership debts and appropriate the same to his own use.

Wherefore the plaintiff prays:

I. That said copartnership may be dissolved, and an accounting taken of all the dealings and transactions thereof.

II. That the property of the firm be sold, and the firm's debts and l abilities be paid off, and the surplus, if any, divided between the plaintiff and defendant, according to their respective interests, and for such other relief as may be just, together with the costs of this suit.

§ 516. For Accounting After Dissolution.

Form No. 106.

[Title.]

The plaintiff complains, and alleges:

I. [Allege formation and purposes of partnership as in preceding form.]

II. That on or about the ..... day of ....., ..., 18...., by the mutual consent of said partners, the said firm was dissolved.

III. That at such time the defendant promised and agreed with the plaintiff to account for and pay over to the plaintiff his proportionate share of all moneys which had been previously collected by the defendant, on account of said firm, and also to collect the debts due said firm, and render, from time to time, to the plaintiff, on demand, full statements of the debts due to said firm, and the payments made on account thereof, and to pay over to the plaintiff his full share of the assets of said firm.

IV. That prior and since the dissolution of said firm the defendant has collected large sums of money, amounting to the sum of ..... dollars, more or less, on account of the debts due to said firm, and has applied the same, and the whole thereof, to his own use, and has neglected and refused, and still does neglect and refuse, to account with and pay to the plaintiff his proportionate share of the assets of said firm, so collected as aforesaid, or any part thereof, although often requested by the plaintiff so to do.

[Demand for relief as in preceding form, omitting prayer for dissolution.]

§ 517. Against Partners—Averring Partnership.

Form No. 107.

[State and County.] [Court.]

John Doe, Plaintiff,
against
A. B. and C. D., Defendants.

The plaintiff complains of the defendants, and alleges:

I. That at the time hereafter mentioned, the defendants were copartners, and doing business as merchants or traders [or otherwise] at the city of ....., under the firm name of A. B. & Co.

II. [State cause of action.]

[Demand of Judgment.]

§ 518. **Allegation of Partnership.**—The same allegation will do where the plaintiffs are partners, substituting the word "plaintiffs" for "defendants." Where the partnership is a material fact, it should be alleged.[1] A distinct averment of partnership between the plaintiffs is only necessary when the right of action depends upon the partnership.[2] When a joint ownership or joint contract will enable them to recover, it is no objection to their complaint that their partnership is not pleaded.[3]

§ 519. **Dormant Partner.**—At common law a dormant partner need not, and ought not to be joined in a suit by the firm.[4] But if a dormant partner be unknown in the contract of a lease, it was held that he need not be joined as defendant.[5] They have the right, but are not bound, to sue all under such circumstances.[6] Where the name of a dormant partner was fraudulently concealed, an injunction to restrain a levy on partnership property was set aside.[7]

§ 520. By a Surviving Partner.

Form No. 108.

[State and County.] [Court.]

John Doe, Plaintiff,
against
Richard Roe, Defendant.

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the plaintiff and

[1] See Parties, *ante*.

[2] Loper v. Welch, 3 Duer, 644; and see Oechs v. Cook, Id. 161.

[3] For a sufficient though informal averment of partnership, see Anable v. Conklin, 25 N. Y. 470; Anable v. Steam Engine Co., 16 Abb. Pr. 286.

[4] Leveck v. Shaftoe 2 Esp. 468; 7 T. R. 361; Lloyd v. Archbowle, 2 Taunt. 324; 1 Ch. Pl. 9; Clarkson v. Carter, 3 Cow. 84; Clark v. Miller, 4 Wend. 628; N. Y. Dry Dock Co. v. Treadwell, 19 Wend. 525. But the rule would appear to be otherwise under the code of New York: See Secor v. Keller, 4 Duer, 416; and compare Belshaw v. Colie, 1 E. D. Smith, 213.

[5] Hurlbut v. Post, 1 Barb. 28.

[6] Brown v. Birdsall, 29 Barb. 549.

[7] Van Valen v. Russell, 13 Barb. 590.

one C. D. were partners, doing business as merchants or traders [or otherwise] at the city ....., under the firm name of "John Doe & Co."

II. [Statement of cause of action.]

III. That on the ..... day of ....., 18..., at ....., said C. D. died, leaving the plaintiff the sole survivor of the said firm.[1]

[Demand of Judgment.]

§ 521. **Duties of Surviving Partner.**—The surviving partner is to wind up the affairs of the partnership, and pay its debts out of the assets, if sufficient, and divide the residue, if any, among those entitled to it.[2] And a claim of the surviving partner against the estate of the deceased partner is contingent and does not become absolute till the partnership affairs are settled.

§ 522 **Partnership Debt.**—An action at law does not lie against the personal representative of the deceased partner. It must be brought against the survivor.[3] So, when one of two joint covenanters dies.[4]

§ 523. **Promise, how Stated.**—In an action for a debt which accrued to the partnership before the death of one of its members, that fact, the death of the member, and survivorship must be alleged, unless there has been an accounting with the survivor.[5]

§ 524. **Right of Possession.**—A surviving partner has the exclusive right of possession, and the absolute power of disposition of the assets of the partnership.[6]

§ 525. **Services.**—He is not entitled to pay for his services in merely winding up the affairs of the concern.[7] But if he expends his time and labor in the care and management of the partnership property, by which its value is enhanced, he should receive compensation for the same.

§ 526. **Survivor, Liabilities of.**—The survivor of a partnership may be charged on a debt of the firm, contracted before the death of the other, and without averring the partnership, death, etc.[8] And the personal representative of a deceased partner can not be joined with him, unless the survivor be insol-

[1] This form is necessary only when the cause of action accrued to the partnership.

[2] Gleason v. White, 34 Cal. 258.

[3] Grant v. Saurter, 1 Wend. 148.

[4] Gere v. Clark, 6 Hill, 350.

[5] Holmes v. De Camp, 1 Johns. 36; Tom v. Goodrich, 2 Johns. 213.

[6] Allen v. Hill, 16 Cal. 113; see California Code Civil Procedure, sec. 1585.

[7] Griggs v. Clark, 23 Cal. 427.

[8] Goelet v. McKinstry, 1 Johns. Cas. 405; compare Holmes v. De Camp, 1 Johns. 34.

vent.[1] Where, after the death of one partner, on account stated between defendant and the copartnership, admitting balance due for goods sold in the life-time of deceased, the survivor may recover it on *insimul computassent*, without averring the death of the other partner.[2]

CHAPTER IX.

PUBLIC OFFICERS.

§ 527. By or against Public Officers.

Form No. 109.

[State and County.] [Court.]

A. B., [Comptroller] of the State of California, Plaintiff,
against
C. D., Defendant.

The plaintiff complains, and alleges:

I. That he is [Comptroller of the State of California].

II. [State the cause of action, etc.]

[Demand of Judgment.]

§ 528. Actions against Officers.—That in an action against the collector of the customs for refusing a clearance, a count stating that the plaintiff was the owner of the vessel, laden with a cargo of a certain value, the allegation is sufficient as respects ownership of the cargo.[3]

§ 529. Acts of Deputy.—In an action against a sheriff for wrongful acts of deputy, it is not essential that the complaint should allege that he is sheriff nor the acts complained of were committed by his deputy.[4] The act of the deputy should be alleged as that of the sheriff.[5]

§ 530. Official Character must be Averred.—The official character must be averred in the body of the complaint.[6] A very short averment, if clear in its terms, is sufficient;[7] though a special authority must be averred with fullness sufficient to make it clearly apparent.[8] But a sheriff suing as such,

[1] Voorhis' Ex'rs v. Child, 17 N. Y. 354; Moorehouse v. Ballou, 16 Barb. 289; Higgins v. Freeman, 2 Duer, 650.

[2] Holmes v. De Camp, 1 Johns. 34.

[3] See Bas v. Steele, 3 Wash. C. Ct. 381.

[4] Poinsett v. Taylor, 6 Cal. 78; Curtiss v. Fay, 37 Barb. 64.

[5] People v. Ten Eyck, 18 Wend. 448; Hirsch v. Rand, 39 Cal. 318; Campbell v. Phelps, 17 Mass. 246.

[6] Compare Gould v. Glass, 19 Barb. 185, with Smith v. Levinus, 8 N. Y. 472; Ogdensburgh B'k v. Van Rensselaer, 6 Hill, 240; Delafield v. Kinney, 24 Wend. 345; Fowler v. Westervelt, 17 Abb. Pr. 59; 40 Barb. 374.

[7] Smith v. Levinus, 4 Seld. 472; Root v Price, 22 How. Pr. 372; Hallett v. Harrower, 33 Barb. 537.

[8] Id.

need not state in his complaint how he acquired his office. It is enough to show that he is sheriff in fact.[1]

§ 531. **Official Capacity, how Averred.**—That "the plaintiff is sheriff of the city and county of San Francisco," is a sufficient allegation of his official character.[2] Where the title gives the names of the plaintiffs with the description "commissioners of highways," and in the body of the complaint it is averred "that the plaintiffs, commissioners of highways, complain," the character in which they complain is sufficiently indicated.[3]

§ 532. **Title.**—A party suing as a public officer should sue in his own name, with the addition of his name of office.[4] For the words in brackets in the above form any others may be substituted which will properly designate the title and jurisdiction of the officer.

§ 533. By Sheriff Suing in Aid of Attachment

Form No. 110.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is the sheriff of the [city and] county of ....., duly elected, qualified, and acting as such.

II. That on the ..... day of ....., 18 ..., a warrant of attachment was issued out of this court, and to him directed and delivered, as such sheriff, in an action against A. B., whereby he was directed to attach and keep all the property of said A. B. in his county.

III. That the defendant then had in his possession ..... dollars belonging to A. B. [or was indebted to the said A. B. in the sum of ..... dollars].

IV. That on the ..... day of ....., 18 ..., the plaintiff made due service of said warrant by delivering to and leaving with said defendant a copy thereof, with a notice showing the property levied on; whereupon the plaintiff became entitled to receive from the defendant, and he became answerable to the plaintiff for said ..... dollars, which the defendant refuses to pay over to the plaintiff, or to account to him therefor; to his damage..... dollars.[5]

[DEMAND OF JUDGMENT.]

[1] Kelly v. Breusing, 33 Barb. 123; affirming S. C., 32 Id. 601.

[2] Kelly v. Breusing, 32 Barb. 601; affirmed in 33 Barb. 123.

[3] Fowler v. Westervelt, 40 Barb. 374.

[4] Paige v. Fazackerly, 36 Barb. 392; Trustees Fire Department of Brooklyn v. Acker, 26 How Pr. 263; Fowler v. Westervelt, 40 Barb. 384; 17 Abb. Pr. 59.

[5] This form, with slight changes, from Abbott's excellent work on forms, is not applicable under the California statute; but being an approved form

§ 534. **Right of Action.**—The sheriff who levies an attachment has not the right of property in the debt, and can not maintain an action in his own name for the recovery thereof.[1] An indemnity bond to the sheriff to retain property seized under attachment, is an instrument necessary to carry the power to sue into effect.[2]

§ 535. **Against Sheriff, for not Executing Process.**

Form No. 111.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of issuing the execution hereinafter mentioned, the defendant was the sheriff of the county of Sacramento, in this state.

II. That on the ..... day of ....., 18..., at ....., judgment was duly given and made in an action in the ..... court, in favor of the plainiiff, against one E. F., for [one thousand] dollars.

III. That on the ..... day of ....., 18..., an execution against the property of the said E. F. was issued upon the said judgment, and directed and then delivered to the defendant as sheriff aforesaid.

IV. That on that day the said E. F. had [a large quantity of general merchandise] in his store, No. ....., First street, San Francisco, and owned the said store and lot [or as the case may be], in the said county, out of which the said execution might have been satisfied, of which the defendant had notice.

V. That he refused and neglected to make a levy under or by virtue of said execution, upon said property, or any part thereof [or as the case may be; and if he levies a part, specify it], as by said execution he was required to do, to the damage of the plaintiff ..... dollars.

[DEMAND OF JUDGMENT.]

§ 536. **Arrest, Neglecting to Execute Order of.**—That before the return of said order, to wit, on, etc., notice was given to the defendant that said E. F. was within the said county, and that the defendant there had said E. F. in his view and presence, so that if the defendant had desired so to do he could have arrested the said E. F., by virtue of said order; but the defendant, disregarding his duty, did not arrest the said E. F., and willfully neglected the execution of said order, is sufficient.[3]

under the statute of the state of New York, is deemed of value here. See Kelly v. Brousing, 33 Barb. 123; affirming S. C., 32 Id. 601.

[1] Sublette v. Melhado, 1 Cal. 105.
[2] Davidson v. Dallas, 8 Cal. 227.
[3] Dininny v. Fay, 38 Barb. 18.

§ 537. **Averment of Official Capacity.**—That defendant was sheriff, or acted as such, is a sufficient averment of capacity.[1] If the object of the suit is to establish a personal and not an official liability, for which the sheriff could be sued while he is out of office, an averment of official character in the title is not necessary.[2]

§ 538. **Breach of Duty.**—That although defendant could have levied, of goods of the execution debtor within his bailiwick, the moneys indorsed on the writ, yet defendant, disregarding his duty, did not levy of the said goods, the moneys, or any part thereof, sufficiently charges a breach of duty, and implies improper conduct in the sale of the goods.[3] But the mere omission of a deputy to inform the sheriff of having process in hand is not such negligence as to charge the sheriff, in case a writ last in hand was executed first.[4]

§ 539. **Execution, Averment of.**—It is not necessary to state the terms of the execution, as the courts take judicial notice of the forms of their own proceedings. The steps involved in the issuance of the writ need not be stated. It is sufficient to aver that it was duly issued; the same is true of the levy.[5]

§ 540. **Damages, how Averred.**—The measure of damages for failure to execute an execution is *prima facie* the amount due on the execution. If such amount could not have been collected by the exercise of due diligence, such fact may be shown in defense. Special damage need not be averred.[6] In Illinois the action lies where the officer so delays in making a proper levy that the rights of third parties intervene.[7] The damages on failure to collect an execution are such as the plaintiff shall actually suffer by the sheriff's neglect.[8] Where the sheriff accepts an assignment of a chattel mortgage, the plaintiff in execution being ignorant thereof, is not bound by his acts.[9]

[1] Potter v Luther, 8 Johns. 431; Dean v. Gridley, 10 Wend. 255; and see Hall v. Luther, 13 Id. 491; compare Curtis v. Fay, 37 Barb. 64.

[2] Stillman v. Squire, 1 Den. 327; Armstrong v. Garrow, 6 Cow. 463; Overton v. Hudson, 2 Wash. (Va.) 172; Hirsch v. Rand, 39 Cal. 315; Curtis v. Fay, 37 Barb. 64; Wymond v. Amsbury, 2 Col. 213.

[3] Mullett v. Challis, 16 Q. B. 239; 20 Law J. R. (N. S.) Q. B. 161; 15 Jur. 243; Political Code, sec, 4180.

[4] Whitney v. Butterfield, 13 Cal. 335.

[5] French v. Willet, 10 Abb. Pr. 99; First Nat. Bank v. Rogers, 13 Minn. 407.

[6] Moore v. Floyd, 4 Or. 101; Ledyard v. Jones, 7 N. Y. 550; Dunphy v. Whipple, 25 Mich. 10; Clough v. Monroe, 34 N. H. 381; Evans v. House, 26 Ohio St. 488; Roth v. Duval, 1 Idaho, 149; People v. Roper, 4 Scam. 560. That damages must be averred, see Nash v. Whitney, 39 Me. 341; Commonwealth v. Lelar, 1 Phila. 333.

[7] Davidson v. Waldron, 31 Ill 120.

[8] French v. Snyder, 30 Ill. 359.

[9] Dibble v. Briggs, 28 Ill. 48

§ 541. **Notice.**—The allegation of notice, though usual, seems unnecessary.[1]

§ 542. **Refusal to Make Deed.**—In an action against a sheriff for special damages, resulting from a refusal on the part of the sheriff to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at sheriff's sale, when there is no allegation in the complaint of title, nor any averment that in case the deed had been executed, plaintiff would have been able to recover possession of the premises, or the rents and profits, it was held that such complaint is insufficient.[2]

§ 543. **Replevin.**—The proper mode of declaring in a complaint against a sheriff for not taking sufficient security in replevin, or in executing a writ in replevin, is stated in the cases cited below.[3] Where defendant had a right to replevy, a complaint which avers that the marshal neglected to make the money is bad.[4]

§ 544. **Selling Homestead.**—A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiffs, which set out that the sheriff was in possession of a certain execution against plaintiff, J. Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of plaintiffs, and averring damages in the sum of two thousand dollars, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. No damage has or can result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at sale could acquire no right to the property, nor could the plaintiff suffer any injury.[5]

§ 545. **Against Sheriff for Neglecting to Return Execution.**

Form No. 112.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of the issuing of the execution hereinafter mentioned, the defendant was the sheriff of the county of ....., in this state.

II. That on the ..... day of ...., 18..., in an action in the superior court of the county of ....., in this state [or other court], wherein this plaintiff was plaintiff, and one A. B.

[1] Tomlinson v. Rowe, Hill & D. Supp. 410.

[2] Knight v. Fair, 12 Cal. 296.

[3] See Gibbs v. Bull, 18 Johns. 435; Westervelt v. Bell, 19 Wend. 531.

[4] Bispham v. Taylor, 2 McLean, 355.

[5] Kendall and Wife v. Clark, 10 Cal. 17.

was defendant, the plaintiff recovered a judgment duly given by said court against the said A. B., for ..... dollars.

III. That on the ..... day of ....., 18 ..., an execution against the property of said A. B. was issued on said judgment, and directed and then delivered to the defendant, as sheriff of the county of ....., of which execution the following is a copy: [Copy the execution and indorsement.]

IV. That although [more than] ..... days elapsed after delivery of said execution to the defendant, and before the commencement of this action, yet he has, in violation of his duty as such sheriff, failed to return the same, to the damage of the plaintiff ..... dollars.

[Demand of Judgment.]

§ 546. **The Same—Under California Statute.**—The Political Code of California provides as follows:

"If the sheriff does not return a notice or process in his possession, with the necessary indorsement thereon, without delay, he is liable to the party aggrieved for the sum of two hundred d llars, and for all damages sustained by him."[1]

Under this statute, add to the above the following:

Form No. 113.

And whereby, also, the defendant has become and is liable to the plaintiff in the further sum of two hundred dollars under the provisions of section 4179 of the political code of the state of California.

Wherefore the plaintiff demands judgment against the defendant for the said sum of two hundred dollars, under the provisions of the statute aforesaid, and the further sum of ..... dollars, his damages so as aforesaid sustained, and for costs of suit.

§ 547. **Issue of Process.**—It is sufficient after showing jurisdiction to issue process, to allege that it was issued.[2]

§ 548. **Property.**—In an action for not returning an execution, the complaint need not aver that defendant had property out of which the money might have been levied. The gist of the action is the neglect to return.[3] It is not necessary to allege or prove special damages.[4]

§ 549. **Remedy.**—Plaintiff may proceed by attachment, or may sue for the neglect.[5] This action lies, although the sheriff has not been ordered to make return.[6]

[1] Political Code, sec. 4179.
[2] French v. Willet, 4 Bosw. 649; S. C., 10 Abb. Pr. 99.
[3] Pardee v. Robertson, 6 Hill, 550.
[4] Ledyard v. Jones, 7 N. Y. 550.
[5] Burk v. Campbell, 15 Johns. 456; Bank of Rome v. Curtiss, 1 Hill, 275;
[6] Burk v. Campbell, 15 Johns. 456; Bank of Rome v. Curtiss, 1 Hill, 275; Pardee v. Robertson, 6 Id. 550.

§ 550. **Request.**— A request to return execution need not be alleged.[1]

§ 551. **Against Sheriff, for Neglecting to Pay Over Moneys Collected on Execution.**

Form No. 114.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant was the sheriff of the county of . ....., in this state.

II. That on the ..... day of ....., 18..., at ....., an execution, then duly issued, in form and effect as required by law against the property of one A. B., and in favor of the plaintiff, upon a judgment for the sum of .... dollars theretofore duly given in favor of the plaintiff against said A. B., in the superior court of the county of ....., in this state, was by the plaintiff directed and delivered to the defendant as such sheriff.

III. That the defendant thereafter, as such sheriff, collected and received upon said execution, to the use of the plaintiff, the sum of ..... dollars, besides his lawful fees.

IV. That although [more than] sixty days elapsed, after the delivery of said execution to the defendant, before this action, yet he has, in violation of his duty as sheriff, failed to pay over to the plaintiff the amount so collected.

[DEMAND OF JUDGMENT.]

§ 552. **The Same—Under California Statute.**—The political code of California provides: "If he neglects or refuses to pay over on demand, to the person entitled thereto, any money which may come into his hands by virtue of his office (after deducting his legal fees), the amount thereof, with twenty-five per cent damages, and interest at the rate of ten per cent per month from the time of demand, may be recovered by such person."[2] Under this section neither the rate of interest specified therein nor twenty-five per cent as damages can be recovered unless there has been a demand for the money collected, prior to the commencement of the suit, and in such case the complaint must aver such demand and the date thereof.

The above form is sufficient for the recovery of the money received by the sheriff and legal interest from the time it should have been paid over. If it is desired to recover the damages and special rate of interest provided for in the above section of

[1] Corning v. Southerland, 3 Hill, 552; Fisher v. Pond, 2 Id. 338; Howden v. Stanish, 6 C. B. 504; S. C., 60 Eng. Com. L. R. 503.

[2] Political Code, sec. 4181.

the code, omit Part IV in the above form, and insert the following.

Form No. 115.

IV. On the ..... day of ....., 18..., the plaintiff demanded of the defendant that he pay over to him the moneys so received by him upon said execution, as aforesaid, less his lawful fees thereon, yet he has, in violation of his duty as such sheriff, failed and neglected to pay over to the plaintiff the amount so collected; by reason whereof the said defendant has become and is liable to the plaintiff for the moneys collected as aforesaid, to wit, the sum of ..... dollars, together with twenty-five per cent thereof, as damages for the non-payment thereof, and interest on the said sum of .... dollars, at the rate of ten per cent per month from the said ..... day of ....., 18...

Wherefore the plaintiff demands judgment against the defendant for the said sum of ..... dollars and interest thereon at the rate of ten per cent per month from the said ..... day of ....., 18.., and the further sum of ..... dollars, being twenty-five per cent of said sum of ..... dollars, under the provisions of the statute aforesaid, and for costs of suit.

§ 553. **Against Deputy.**—To render a deputy liable, an express promise must be shown.[1]

§ 554. **Delivery of Execution.**—It is enough to show the delivery of execution without proving the judgment.[2]

§ 555. **Demand.**—In an action against a sheriff to recover property seized under process, or its value by the owner, it is not necessary that the plaintiff should show affirmatively notice and demand before bringing suit. This rule is now established by the weight of authority. The early cases in California held the contrary, but they have since been overruled.[3]

§ 556. **Money Paid Over.**—Where it is averred in the complaint that the money has been collected, and that defendant has failed to return the execution, it will not be presumed that the money has not been paid over. An averment to this effect is essential.[4]

[1] Tuttle v. Love, 7 Johns. 470; Paddock v. Cameron, 8 Cow. 212; and see Colvin v. Holbrook, 2 N. Y. 126; affirming S. C., 3 Barb. 475.

[2] Elliott v. Cronk, 13 Wend. 35; and see 1 Cow. Tr. 322.

[3] Wellman v. English, 38 Cal. 583; Boulware v. Craddock, 30 Id. 190, overruling Ledley v. Hays, 1 Id. 160; Daumiel v. Gorham, 6 Id. 44. See also Kluender v. Lynch, 2 Abb. App. Dec. 538; Moore v. Murdock, 26 Cal. 514; Woodbury v. Long, 8 Pick. 543; Owings v. Frier, 2 A. K. Marsh. 268; Jamison v. Hendricks, 2 Blackf. 94; Hicks v. Cleveland, 48 N. Y. 84; Glossop v. Pole, 3 M. & S. 175; Glasspoole v. Young, 9 B. & C. 696; Edwards v. Bridges, 2 Stark. 396.

[4] Hoag v. Warden, 37 Cal. 522.

§ 557. **Obligation to Pay.**—So, to say that plaintiff has been obliged to pay the amount of, etc., in consequence of the negligence and acts of the defendant in his office of under-sheriff, is good, at least on general demurrer;[1] even if process is voidable.[2]

§ 558. **Remedy.**—An action on the case, or an action for money had and received, may be maintained, at the option of the plaintiff.[3]

§ 559. **Statute Penalties.**—Where a sheriff fails to pay over money collected on execution, the action should be for a false return.[4] The statute penalties against sheriffs, for the non-payment of moneys collected on execution, are only recoverable when the sheriff by his return admits the collection of the money, but refuses to pay it over.[5]

§ 560. **Sufficient Averment.**—It is enough to say generally that the defendant had collected or embezzled, etc., such a sum, which he had refused, etc., without setting forth the particular items, which would lead to prolixity.[6]

§ 561. **Against Sheriff, for False Return.**

Form No. 116.

[Title.]

The plaintiff complains, and alleges:

I. That at the time of issuing the execution hereinafter mentioned, the defendant was the sheriff of the county of ....., in this state,

II. That on the ..... day of ....., 18 ..., at ....., judgment was duly given and made in an action in the..... court, in favor of the plaintiff, against one G. W., for [ten thousand] dollars.

III. That on the ..... day of ....., 18 ..., an execution against the property of the said G. W. was issued upon the said judgment, directed and delivered to the defendant, as sheriff aforesaid.

IV. That the defendant afterwards, and during the life thereof, levied, under the said execution, on property of the said W. [of the value of ten thousand dollars; or sufficient to satisfy the said judgment, with all the expenses of the execution; or state particulars of property on which he might have levied.]

[1] Hughes v. Smith, 5 Johns. 168.

[2] Walden v. Davison, 15 Wend. 575; Bacon v. Cropsey, 7 N. Y. 195; and see Ontario Bank v. Hallett, 8 Cow. 192; Grosvenor v. Hunt, 11 How. Pr. 355; Ginochio v. Orser, 1 Abb. Pr. 433.

[3] Dygert v. Crane, 1 Wend. 534; Shepard v. Hoit, 7 Hill, 198.

[4] Egery v. Buchanan, 5 Cal. 54.

[5] Johnson v. Gorham, 6 Cal. 196; 2 Nev. 378; Gregory v. Ford, 14 Cal. 143.

[6] Postmaster-general v. Cochran, 2 Johns. 413; Hughes v. Smith, 5 Id. 168.

V. That the defendant afterwards, in violation of his duty as such sheriff, falsely returned upon the said execution, to the clerk of the county of ....., that the said W. had no property in his county on which he could levy the amount of said judgment or any part thereof.

VI. That by means of said premises, the plaintiff has been deprived of the means of obtaining the said moneys directed to be levied as aforesaid, and which are still wholly unpaid, and is likely to lose the same.

[DEMAND OF JUDGMENT.]

§ 562. **The Same—Allegation for not Levying when there was an Opportunity, and Falsely Returning Nulla Bona.**

Form No. 117.

[Allege as in preceding form down to IV, and insert]:

IV. That the defendant neglected to make any levy on the goods and chattels, lands, and tenements of the said G. W.; and falsely and fraudulently returned upon the said writ to the said court, that the said G. W. had not any goods or chattels, lands or tenements, in his county. That by reason of the premises, the plaintiff is deprived of his remedy for obtaining payment of his judgment and costs aforesaid, and has wholly lost the same.

[DEMAND OF JUDGMENT.]

§ 563. **The Same—Another Form of Allegation.**

Form. No. 118.

[Allege as in preceding form, and insert]:

IV. That the defendant, so being sheriff as aforesaid, and having the said order in his hands to execute, and knowing that the said G. W. was in his county and view as aforesaid, falsely and deceitfully returned on the same order to said court, that the said G. W. could not be found in his county.

[DEMAND OF JUDGMENT.]

§ 564. **Cause of Action.**—The cause of action for a false return arises only on actual return of the writ; but it relates back to the return day, and the false return is properly alleged to have been on that day.[1] An officer who should refuse to proceed upon a second execution would be liable for a false return.[2] A "fee bill" is a process, and governed by the same rule as executions.[3]

[1] Michaels v. Shaw, 12 Wend. 587.

[2] Goss v. Weber, 26 Ill. 221; Davidson v. Wallron, 31 Id. 120; Moore v. Fitz, 15 Ind. 43. See Howe v. White, 49 Cal. 658.

[3] De Wolf v. Long, 2 Gilm. 678; 5 Id. 96; Newkirk v. Chapman, 17 Ill. 344; 24 Tex. 12.

§ 565. **Measure of Damages.**—The plaintiff is entitled, *prima facie*, to the face of the execution.[1] And in case of loss of property by negligence, the damages are the value of the property lost.[2] It is not essential to aver any special damage. The amount due on the judgment is, *prima facie*, the measure of damages.[3]

§ 566. **That Return was False.**—The complaint should show that the return was false, and that the respect in which it was false is material; deceit or fraud need not be alleged.[4]

§ 567. **Valid Judgment.**—In such action, plaintiff must prove a valid judgment.[5]

§ 568. **For Seizing a Vessel.**

Form No. 119.

[Title.]

The plaintiff complains, and alleges:

I. That the plaintiff is, and at the time hereinafter mentioned was the owner of [naming the vessel], her tackle, apparel, and furniture, and that he had chartered the same to one A. B., for a voyage from ..... to ....., and back, for ..... dollars per week.

II. That when said vessel was at ....., on her voyage aforesaid, and in the possession of C. D., her master, appointed by the plaintiff, the defendant, on or about the ..... day of ....., 18..., forcibly seized the same, with her apparel, furniture, and cargo, of the value of ..... dollars, and brought the same to .....

III. That in consequence thereof the plaintiff has lost the said vessel, her apparel, equipments, and furniture, and the money which he was to receive for the charter for the period of ..... weeks, and has been put to great cost and expense in and about asserting and maintaining his rights to said vessel, her tackle and furniture.

[Demand of Judgment.]

§ 569. **For an Escape.**

Form No. 120.

[Title.]

The plaintiff complains, and alleges:

I. That at the time of issuing the execution and of the escape

[1] Ledyard v. Jones, 8 Seld. 550; Rome v. Curtiss, 1 Hill, 275; Pardee v. Robertson, 6 Id. 550; Kellogg v. Manro, 9 Johns. 300; Weld v. Bartlett, 19 Mass. 474.

[2] Morgan v. Meyers, 14 Ohio, 538; Smith v. Fuller, Id. 545.

[3] Ledyard v. Jones, 7 N. Y. 550, affirming S. C., 4 Sandf. 67; Pardee v. Robertson, 6 Hill, 550; Bank of Rome v. Curtiss, 1 Id. 275; and see Bacon v. Cropsey, 7 N. Y. 195.

[4] Peebles v. Newson, 74 N. C. 473; Bacon v. Cropsey, 7 N. Y. 195; Kidzie v. Sackrider, 14 Johns. 195; Houghton v. Swarthout, 1 Den. 589.

[5] McDonald v. Bunn, 3 Den. 45.

hereinafter mentioned, the defendant was the sheriff of the county of ....., in this state.

II. That on the ..... day of ....., 18 ..., in an action in the [superior court of the county of ....., in this state], brought by this plaintiff against one A. B. for embezzlement [or other cause authorizing arrest], this plaintiff recovered judgment, duly given by said court against said A. B., for..... dollars.

III. That on the ..... day of ....., 18 ..., an execution against the property of said A. B. was duly issued by the clerk of said court on said judgment, and thereafter duly returned wholly unsatisfied.

IV. That thereafter, on the ..... day of ..... , 18..., an order of arrest was issued by the judge of the said court against the person of said A. B., and then directed and delivered to the defendant as said sheriff, whereby he was required to arrest said A. B., and commit him to the jail of said county of ....., until he should be discharged according to law.

V. That thereafter the defendant, as such sheriff, arrested said A. B. and committed him to jail, pursuant to said execution, and order or arrest.

VI. That thereupon the plaintiff entered into an undertaking, with good and sufficient securities, duly executed and approved, conditioned for the payment of the expenses of said A. B. for necessary food, clothing, and bedding [or state a deposit for this purpose].

VII. That in violation of his duty as such sheriff, he has since, to wit, on the ..... day of ....., 18...., without the consent or connivance of the plaintiff permitted said A. B. to escape, to the damage of the plaintiff, ... dollars.

Wherefore the plaintiff demands judgment against the defendant, according to the statute, for the debt [or for damage, or sum of money] for which such prisoner was committed, to wit, ... dollars, with interest from, etc.[1]

[1] In California the political code provides, sec. 4182: "A sheriff who suffers the escape of a person in a civil action, without the consent or connivance of the person in whose behalf the arrest or imprisonment was made, is liable as follows:

"1. When the arrest is upon an order to hold to bail or upon surrender in exoneration of bail before judgment he is liable to the plaintiff as bail.

"2. When the arrest is upon an execution or commitment to enforce the payment of money, he is liable in the amount expressed in the execution or commitment.

"3. When the arrest is on an execution or commitment other than to enforce the payment of money, he is liable for the actual damages sustained.

"4. Upon being sued for damages

§ 570. **Arrest for Contempt.**—A complaint in an action against a sheriff, for the escape from his custody of a person arrested by him upon a process for contempt, which alleges that the sheriff "suffered and permitted such person to escape and go at large," states a voluntary and not a negligent escape; and an answer which avers that such person may have "wrongfully and privily, and without the knowledge, permission, or consent of this defendant, escaped," etc., and that "if he did so escape, he afterwards" returned into custody, etc., is insufficient as a pleading, as it does not deny, either generally or specifically, the allegation that the sheriff permitted the prisoner to escape.[1]

§ 571. **Authority to Release.**—The general authority of the attorney as such, is not sufficient to authorize the sheriff to discharge the prisoner upon his consent.[2]

§ 572. **Committed.**—That he had arrested the debtor and detained him in custody in execution, sufficiently imports commitment to jail.[3]

§ 573. **Damages.**—The measure of damages is only *prima facie* the amount of the debt.[4] A complaint which claimed the amount of the debt, with interest and costs, without using the word "damages," is equivalent to a declaration in debt.[5]

§ 574. **Escape, Definition of.**—In New York, if a person admitted to the liberties of the jail limits is without such limits by virtue of a valid legal process which affords justification to the officer taking him thence, it is not to be deemed an escape within the meaning of 2 R. S. 437, sec. 63, although that section contains no express exception to the rule that being without the boundaries is an escape. To constitute an escape there must be some agency of the prisoner employed, or some wrongful act by another against whom the law gives a remedy.[6] The act of the

for an escape or rescue, he may introduce evidence in mitigation and exculpation."

Sec. 4183. "He is liable for a rescue of a person arrested in a civil action, equally as for an escape."

Sec. 4184. "An action can not be maintained against the sheriff for a rescue, or for an escape of the person arrested upon an execution or commitment, if after his rescue or escape and before the commencement of the action, the prisoner returns to jail, or is retaken by the sheriff."

[1] Loosey v. Orser, 4 Bosw. 391.

[2] Kellogg v. Gilbert, 10 Johns. 220.

[3] Ames v. Webbers, 8 Wend. 545.

[4] Ginochio v. Orser, 1 Abb. Pr. 433; Potter v. Lansing, 1 Johns. 215; Russell v. Turner, 7 Id. 189; Thomas v. Weed, 14 Id. 255; Littlefield v. Brown, 1 Wend. 398; Patterson v. Westervelt, 17 Id. 543; Fairchild v. Case, 24 Id. 381; Ames v. Webbers, 8 Id. 545; Hutchinson v. Brand, 9 N. Y. 208.

[5] Renick v. Orser, 4 Bosw. 384; McCreery v. Willet, Id 643.

[6] Allen on Sheriffs. 231; Baxter v. Taber, 4 Mass. 361; Cargill v. Taylor, 10 Id. 206.

law, as well as the act of God or of the public enemies, will excuse the sheriff in an action for escape.[1]

§ 575. **Excuse.**—Nothing but the act of God or public enemies will excuse the sheriff for an escape.[2] In California the sheriff is liable for a rescue equally as for an escape;[3] but an action can not be maintained for either after the prisoner returns to jail, or is recaptured by the sheriff.[4]

§ 576. **Form of Allegation in Debt.**—That thereupon, the judgment remaining wholly unpaid, the defendant became indebted to the plaintiff in the sum of ..... dollars, the amount of said judgment.[5] This form is equivalent to a declaration in debt.

§ 577. **Indorsement.**—The indorsement on the execution or writ need not be set out.[6]

§ 578. **Liability as Bail.**—If, after being arrested upon an order to hold to bail, or upon a surrender in exoneration of bail before judgment, the defendant escape or be rescued, the sheriff shall himself be liable as bail; but he may discharge himself from such liability by the giving and justification of bail at any time before judgment.[7] Whether a judgment creditor, injured by the escape of his debtor from arrest, elects to sue the sheriff at common law for escape, or under section 201 of the code of procedure of New York, as bail, is manifested by the complaint. If he proceeds against the sheriff as bail, he must set forth the proceedings to and including the escape, and allege that the defendant is bail, and must bear the appropriate judgment. If he elects to prosecute for an escape, the complaint will contain the same matters, but all allegation as to the character of the defendant as bail should be omitted, as wholly irrelevant to a cause of action for an escape. A complaint in such a case, which makes no mention of the defendant as bail, and contains nothing manifesting an intention or election to hold him liable in that character, is to be treated as intending an action for an escape.[8]

§ 579. **Negligence.**—An officer who negligently permits an escape is liable to the person injured by his neglect of duty;[9]

[1] Wilckens v. Willett, 1 Keyes, 521, affirming S. C., *sub nom.* Wickelhausen v. Willet, 12 Abb. Pr. 319; 21 How. Pr. 40

[2] Fairchild v. Case, 24 Wend. 381; Rainey v. Dunning, 2 Murph. 386.

[3] Political Code, sec. 4183.

[4] Id. 4184.

[5] Barnes v. Willett, 11 Abb. Pr. 225; S. C., 19 How Pr. 564; so in Renick v. Orser, 4 Bosw. 884, and McCreery v. Willett, Id. 643.

[6] Jones v. Cook, 1 Cow. 309.

[7] Political Code, sec. 4182, subd. 1.

[8] Smith v. Knapp, 30 N. Y. 581.

[9] Brown v. Genung, 1 Wend. 115; 37 Ill. 257.

and an escape from a deputy may be declared on as an escape from the sheriff.[1]

§ 580. **Voluntary.**—A complaint which alleges that "the sheriff suffered and permitted such person to escape and go at large," states a voluntary and not a negligent escape.[2] Under the averment that he voluntarily suffered the party to escape, a negligent escape may be proved;[3] and evidence of a negligent escape supports an action for a voluntary one.[4]

CHAPTER X.

RECEIVERS.

§ 581. By a Receiver Appointed Pending Litigation.

Form No. 121.

[STATE AND COUNTY.] [COURT.]

A. B., Receiver of the Property of C. D., Plaintiff,
against
E. F., Defendant.

The plaintiff, as receiver of the property of C. D., complains, and alleges:

I. [State cause of action.]

II. That on the ..... day of ....., 18 ..., at the city and county of San Francisco, and state of California, in an action then pending in the superior court of the ....., county of ....., state of ....., wherein C. D. was plaintiff and E. F. was defendant, upon an application made by the said A. B., and by order duly made by said court [or judge], this plaintiff was appointed receiver of the property of the said C. D., hereinafter described, to wit: [Describe property so as to show that the cause of action is embraced.]

III. That thereafter, and before the commencement of the present action, he gave his bond required by the said order, as such receiver, approved by the said judge, which bond, with such approval, is on file in the said .... court, and were so filed prior to the commencement of this action.

IV. That on the ..... day of ....., 18..., said receiver duly obtained leave of the said court [the court appointing him] to bring this action.

[DEMAND OF JUDGMENT.]

[1] Skinner v. White, 9 N. H. 204.
[2] Loosey v. Orser, 4 Bosw. 391.
[3] 2 T. R. 126; O'Neil v. Marson, 5 Burr. 2814; 1 Saund. 35.
[4] Skinner v. White, 9 N. H. 204.

§ 582. Motion for Appointment of Receiver.

Form No. 122.

[TITLE.]

Plaintiff moves that a receiver be appointed in this action on the following grounds [stating them]:

[SIGNATURE.]

§ 583. **Appointment of Receiver.** — Courts of equity have the power to appoint receivers and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agents; and in proper cases, they can also order the defendant's agents or employees, although not parties to the record, to deliver the specific property to the receiver.[1] But they can not appoint a receiver and decree a sale of the property and affairs of a corporation.[2] Such a decree would necessarily result in a dissolution of the corporation.[3] Under subdivision 5, section 564, California Code C. P., a receiver may be appointed when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. Where the allegations of a bill are general, and the equities are fully denied, such a case is not presented as will justify the appointment of a receiver, and the withdrawal of the property from the hands of one intimately acquainted with all of the affairs of the concern, and placing it in the hands of another who may not be equally competent to manage the business.[4]

In California, the code provides that a receiver may be appointed by the court in which the action is pending, or by a judge thereof:

"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners, or others jointly owning or interested in any fund, on the application of the plaintiff, or of any party whose rights to or interest in the property or fund, or proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

"2. In an action by a mortgagee for the foreclosure of his mortgage, and the sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

[1] Ex parte Cohen, 5 Cal. 494.
[2] Neall v. Hill, 16 Cal. 148.
[3] Id.
[4] Williamson v. Monroe, 3 Cal. 383.

"3. After judgment, to carry the judgment into effect.

"4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

"5. In cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

"6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity." [1]

In construing this provision of the California code it has been held that subdivision 6 thereof is but declaratory of the equity jurisdiction conferred on the courts by the constitution, and includes only the suits in which it has been the usage of courts of equity to appoint a receiver; their jurisdiction in this respect would have been the same in the absence of the statute. It does not include the power to appoint a receiver in an action of ejectment, and an order making an appointment should be annulled; [2] nor does it embrace the power to appoint a receiver of the property of a corporation in aid of a suit prosecuted against the corporation by a private person; such power must be derived from express statute. If a receiver is appointed in such a suit, the appointment will be annulled on *certiorari*.[3] The appointment of a receiver may be made upon an *ex parte* application at chambers.[4]

§ 584. **Alleging Appointment.**—A receiver suing by virtue of his title and authority should state the time and place of his appointment, and distinctly aver that he has been appointed by an order of the court.[5] Where a receiver would make title to a chose in action, he must set forth the facts showing his appointment. It will not be sufficient to aver that he was duly appointed.[6] So describing himself as "having been duly appointed receiver of, etc., and bringing this suit by order of the supreme court," is insufficient on demurrer.[7] And where a plaintiff

[1] California Code Civ. Proc., secs. 564-569; New York Code, sec. 244; Ohio Code, sec. 253.

[2] Bateman v. Superior Court, 54 Cal. 285.

[3] La Société Française etc. v. Fifteenth District Court, 53 Cal. 495.

[4] Real Estate Association v. Superior Court, 60 Cal. 223.

[5] White v. Low, 7 Barb. 204; Gillett v. Fairchild, 4 Den. 80; Bangs v. McIntosh, 23 Barb. 591; Hobart v. Frost, 5 Duer, 672; White v. Low, 7 Barb. 206; Dayton v. Connah, 18 How. Pr. 326.

[6] Gillett v. Fairchild, 4 Den. 80; White v. Joy, 3 Kern. 86; Stuart v. Beebe, 28 Barb. 34; Tuckerman v. Brown, 11 Abb. Pr. 389.

[7] See authorities cited above, note 1; see also Dayton v. Connah, 18 How. Pr. 326.

claims title to a note sued on by virtue of his appointment as receiver of an insurance company, the note being payable to a company bearing a name different from that of the company of which he is receiver, it is necessary that he should, by proper averments, show that the note is a part of the assets of the company of which he has been appointed receiver.[1] If the change of name was by reorganization of the company under the general act, a general averment of the fact of reorganizati n is enough. But alleging that plaintiff is receiver of, etc., appointed by the supreme court by an order made on a specified day, on condition of filing security, and that such security was given accordingly, states enough to enable the defendant to take issue upon the legality of the plaintiff 's appointment.[2]

§ 585. **Appointment Pending Litigation.**—When either party establishes a *prima facie* right to the property, or to an interest in the property, the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired, the court or a judge thereof may appoint a receiver.[3] In a foreclosure suit, the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending a litigation;[4] unless it appears that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.[5]

§ 586. **Appointment after Judgment.**—In an action to recover possession of real estate, and while a motion for a new trial is pending, a receiver of the rents and proceeds of the property in dispute may be appointed, if the facts of the case are such as warrant it. If the defendant in possession is receiving monthly large sums of money from the sale of the waters of mineral springs on the land, and is insolvent, a receiver may be appointed, pending the further litigation, on motion for a new trial and appeal.[6]

§ 587. **Bound by Order of Court.**—Receivers, or other

[1] Hyatt v. McMahon, 25 Barb. 457.

[2] Stewart v. Beebe, 28 Barb. 34; compare Crowell v. Church, 7 Abb. Pr. 205, note. Of the proper mode of complaining in an action by a receiver, of departure from the complaint in the reply, and of the proper mode of seeking relief where the reply departs from the complaint, see White v. Joy, 3 Kern. 83, reversing S. C., 11 How. Pr. 36; 2 Abb. Pr. 548. As to the cases in which a receiver may sue in his own name, and without averring his appointment, see White v. Joy, 13 N. Y. 83; Bank of Niagara v. Johnson, 8 Wend. 645; Haxtun v. Bishop, 3 Id. 13.

[3] Cal. Code Proc., sec. 564.

[4] Guy v. Ide, 6 Cal. 101; Meyer v. Seebald, 11 Abb. (N. S.) 326, note.

[5] La Société Française etc. v. Selheimer, 57 Cal. 623.

[6] Whitney v. Buckman, 26 Cal. 447; see Cal. Code C. P., sec. 564.

custodians of money in the hands of a court, as they are bound to obey orders of the court in their relation to the fund, as well as regards its safe custody as its return, are co-relatively entitled to the protection of the court against loss for disbursements which were necessary and proper and such as a reasonable and prudent man, acting as receiver, would have been justified in expending.[1]

§ 588. **Disbursements of Receiver.**—An order of court directing a referee "to ascertain and report the amount of disbursements and expenses made with or under the direction and authority of the court," by a receiver or custodian of money in the hands of the court, is too narrow to do him justice, and should be so enlarged as to allow for all reasonable and proper expenses incident to the receivership.[2] And this, although the claim is for disbursements incurred by the custodian of the fund under an appointment as assignee in a proceeding in insolvency which was afterwards held to be void.[3]

§ 589. **Discretion of Court.**—The appointment of a receiver rests in the sound discretion of the court upon a view of all the facts; one of which is, that the party asking the appointment should make out a *prima facie* case; and after an *ex parte* appointment has been made, the order may be vacated, either before or after the trial, upon a proper showing.[4]

§ 590. **Leave to Sue and be Sued.**—Unless expressly authorized by the statute under which the appointment is made, a receiver can not sue or be sued without leave of court.[5] And it has been held that the power to collect is not sufficient to authorize him to sue.[6] Notice of the application to the court appointing, for leave to sue the receiver, need not be given to him, nor to the parties to the action in which he was appointed.[7] Where leave to sue or be sued is required to be obtained, that the same was obtained should be alleged in the complaint. Even if this allegation is not held necessary by the courts in some of the states, the safer practice is to make it.[8]

[1] Adams v. Haskell, 6 Cal. 475; Guardian Savings Inst. v. Bowling Green S. I., 65 Barb. 275.

[2] Adams v. Haskell, 6 Cal. 475.

[3] See also O'Mahoney v. Belmont, 60 N. Y. 133.

[4] Copper Hill Min. Co. v. Spencer, 26 Cal. 15.

[5] King v. Cutts, 24 Wis. 627; Battle v. Davis, 66 N. C. 252; Screven v. Clark, 48 Ga. 41; Miami etc. v. Gano, 13 Ohio, 269; Murphy v. Holbrook, 20 Ohio St. 137; High on Rec. 167; De-Groot v. Jay, 30 Barb. 483; Cal. Code Civil Proc., sec. 458.

[6] Screven v. Clark, 48 Ga. 41; King v. Cutts, 24 Wis. 627.

[7] Potter v. Bunnell, 20 Ohio St. 150.

[8] Scofield v. Doscher, 72 N. Y. 491; Watts v. Everett, 47 Iowa, 269. See *contra*, a *dictum* in Finch v Carpenter, 5 Abb. Pr. 225; compare Cal. Code C. P. 568.

§ 591. **Powers, Duties, and Liabilities of Receiver.**—In California, the code provides that the receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property; to receive rents, collect debts; to compound for and compromise the same; to make transfers, and generally to do such acts respecting the property as the courts may authorize.[1] The code of Ohio contains the same provision.[2] A receiver may employ counsel.[3] Upon the application of the receiver, in the suit for dissolution, he can obtain the necessary proceedings for procuring a correct application of the balance of a judgment held by the partnership against a third party, after paying the judgment creditor of the partnership.[4] A receiver can pay out nothing, except on an order of the court; but there are exceptions to the rule; nor will he be denied reimbursement in every case in which he neglects to obtain the order, especially in a court of equity.[5] It will not be presumed that the receiver has transcended his duties, and taken possession of property to which he was not entitled; nor is the opposite party entitled to have issues framed and submitted to a referee or jury to ascertain the ownership of the money in the receiver's hands.[6] A receiver is personally liable to persons sustaining loss or injury by or through his own neglect or misconduct; but for the neglect or misconduct of those employed by him in performance of the duties of his trust, he is liable only in his official capacity, and the judgment against him, if any, must be made payable out of the funds in his own hands as receiver.[7] In this case it was held, that where a railroad was operated by a receiver, a party injured may, by leave of the court appointing the receiver, maintain an action against him as such, for injuries sustained, and that it is no defense in such action that the receiver was a public officer, or that he was an agent or trustee.

§ 592. **Mining Claims.** — The purchaser at a judicial sale of a mining claim may, where the judgment debtor remains in possession, working the claim, and is insolvent, have a receiver appointed to take charge of the proceeds during the period allowed by the statute for redemption.[8]

§ 593. **On Application for Injunction.** — If notice is given

[1] Cal. Code C. P., sec. 568.
[2] Ohio Code, sec. 5590.
[3] Adams v. Woods, 8 Cal. 315.
[4] Adams v. Hackett, 7 Cal. 187.
[5] Adams v. Woods, 15 Cal. 207; Adams v. Haskell, 6 Id. 475.
[6] Whitney v. Buckman, 26 Cal. 451.
[7] Camp v. Barney, 4 Hun, 373; see, also, Miller v. Loeb, 64 Barb. 454; Potter v. Bunnell, 20 Ohio St. 151; Murphy v. Holbrook, Id. 137.
[8] Hill v. Taylor, 22 Cal. 191.

of an application for an injunction, and the petition prays for an injunction, the judge, on the hearing, may appoint a receiver, if the facts make out a proper case for a receiver, and no objection is made on the ground of want of notice of the application.[1]

§ 594. **Setting aside Assignment.**—Where a receiver brings an action to set aside an assignment, he must state in his complaint the equity of the party whose rights he represents, to maintain the action which he attempts to prosecute. A receiver in general is not clothed with any right to maintain an action which the parties or the estate which he represents could not maintain.[2] And he must show a cause of action existing in those parties.[3]

§ 595. **Suit against.**—A suit can not be brought against a receiver when the judgment would disturb the receiver's possession of the property; nor can a creditor bring an action against him to litigate his claim. All such questions may be determined by the court by an intervention in the pending litigation.[4]

§ 596. **Transfer to Receiver.**—In California the transfer to a receiver by order of court of the effects of an insolvent in the suit of a judgment creditor, is not an assignment absolutely void under the insolvent act of 1852, according to any decision of the supreme court, but only void against the claim of creditors.[5] Where it appears that the partners, parties to the suit for a dissolution, held a judgment against a third party which was never reduced to the possession nor under the control of the receiver, the appointment of the receiver would not operate as an assignment or transfer of any property not so reduced to possession within a easonable time.[6]

§ 597. **Vacating Order of Appointment.**—The pendency of a motion for a new trial does not operate as a stay of proceedings, so as to deprive the court of the power of vacating an order appointing a receiver made before the trial.[7] The court which first acquires jurisdiction and appoints a receiver of a fund, has the whole jurisdiction thereof, and is bound to administer it.[8]

[1] Whitney v. Buckman, 26 Cal. 447.

[2] Coope v. Bowles, 42 Barb. 87; S. C., 18 Abb. Pr. 442; and 28 How Pr. 10.

[3] Coope v. Bowles, 42 Barb. 87; S. C., 18 Abb. Pr. 442; and 28 How. Pr. 10.

[4] Spinning v. Ohio Life Ins. and Trust Co., 2 Dis. 336.

[5] Naglee v. Lyman, 14 Cal. 450.

[6] Adams v. Haskell, 6 Cal. 113.

[7] Copper Hill Min. Co. v. Spencer, 25 Cal. 15; Wilson v. Barney, 5 Hun, 257.

[8] O'Mahoney v. Belmont, 62 N. Y. 133.

§ 598. **The Same—Appointed in Supplementary Proceedings.**

Form No. 123.

[TITLE.]

The plaintiff, as receiver of the property of C. D., complains, and alleges:

I. [State cause of action.]

II. That on the ..... day of ....., 18..., at ....., upon an application made by L. M., a judgment creditor of said C. D., in proceedings supplementary to execution, and by an order or determination then duly made by the Hon. G. H., judge of the superior court for the county of ....., state of ...., the plaintiff was appointed receiver of the property of said C. D.

III. That thereafter, and before the commencement of this action, he gave his bond, required by said order, etc. [as in preceding form].

IV. [Allege permission to sue as in preceding form.]

[DEMAND OF JUDGMENT.]

§ 599. **Fund in Hands of Trustees.**—Where a complaint by a receiver, appointed in supplementary proceedings, alleged that a fund was given by will to the defendants as trustees, in trust, to keep the same invested and pay the interest to the execution debtor during his life; that the defendants had collected interest since the appointment of the plaintiff as receiver, but refused to pay the same over to the plaintiff, but did not aver that any part of the interest was in the hands of the defendants, as a surplus above what was necessary for the debtor's support; it was held that the complaint did not state facts sufficient to constitute a cause of action.[1] The interest of the debtor in the income of the fund under such a trust is only subject to the claims of creditors to the extent of a surplus over and above what is necessary or proper for his maintenance and support. The court can not infer that such a surplus exists. It is the duty of the pleader to show by proper averments that such facts exist.[2]

§ 600. **Supplementary Proceedings**—In proceedings supplementary to execution, the court may appoint a receiver when it has all the parties before it.[3]

§ 601. **Another Form—Setting out Proceedings at Length.**

Form No. 124.

[TITLE.]

The plaintiff, as receiver of the property of C. D., complains, and alleges:

[1] Graff v. Bonnett, 31 N. Y. 9. [2] Id. [3] Hathaway v. Bradd, 26 Cal. 586.

I. That E. F. and G. H., of San Francisco, state of California, survivors of C. D., deceased, in an action brought by them in the superior court of the county of ....., state of California, against J. K., obtained judgment against the defendant in that action, on, etc., for the sum of, etc., which judgment was entered by the clerk of the county of ....., on the day aforesaid, and the roll filed and judgment docketed in said clerk's office on that day.

II. That on, etc., an execution therefor was duly issued and delivered to the sheriff of said county of ....., commanding him to make said, etc., with interest from, etc., and make return of his doings in the premises; that said sheriff afterward, and on, etc., returned said execution to the office of the clerk of the county of ....., with his return thereon indorsed, showing the execution wholly unsatisfied.

III. That afterwards, and on, etc., the plaintiff in said action caused an affidavit to be made, setting forth the above facts, as to obtaining said judgment, the filing of transcript, the issuing and return of said execution, and that the said judgment remained wholly unsatisfied, and presented the same to Honorable J. D., judge of the superior court of the county of ....., on the same day, who thereupon, and on, etc., made an order requiring said judgment debtor to appear before L. M., Esq., referee thereby appointed, at the office of said L. M., in, etc., on, etc., at ..... o'clock in the ..... noon, to testify concerning his property; and said N. O. by said order was further forbidden to transfer, or in any manner dispose of, or interfere with any property, moneys, or things in action belonging to him until further order in the premises.

IV. That said order was personally served on said defendant on the same day, and said defendant appeared before said referee at the time and place in said order specified, and severally submitted to an examination under oath, and testified as to his property, which examination was on the same day, by said referee, certified to said judge, who, thereupon, by an order, appointed A. B., of, etc., this plaintiff, receiver of all the debts, property, effects, equitable interests, and things in action of said C. D., and further ordered this plaintiff, before entering upon the execution of his trust, execute to the clerk[1] of this

[1] Under section 567, California Code of Civil Procedure, the undertaking must be made to such person and in such sum as the court or judge may direct. The allegation of the making and filing of the bond should follow the order of the court or judge directing the bond to be given.

court a bond, with sufficient sureties, to be by said judge approved, in the penal sum of....., conditioned for the faithful performance and discharge of the duties of such trust, and that this plaintiff, upon filing such bond in the office of the clerk of the county of ....., be invested with all rights and powers as receiver according to law. The said C. D. was therein and thereby enjoined and restrained from making any disposition of or interfering with his property, equitable interests, things in action, or any of them, except in obedience to said order, until further order in the premises.

V. That on, etc., he executed a bond with sureties, as required by said order, and the rules and practice of this court, which was approved by said judge, and filed in the office of the clerk of the county of, etc.

VI. [Allege cause of action.][1]

[DEMAND OF JUDGMENT.]

§ 602. **By Receiver of Dissolved Corporation.**

Form No. 125.

[TITLE.]

The plaintiff, as receiver of the.....company, complains, and alleges:

I. [State a cause of action accruing to the corporation]

II. That on the.....day of....., 18..., at ....., upon an application made upon occasion of the insolvency of the said ..... company [or state any other reason which may exist], and by an order of the Hon....., judge of the superior court of the county of ..... ., state of California, the plaintiff was appointed receiver of the property, and effects, and things in action of the said..... company, pursuant to statute.

III. [Allege qualification and permission to sue as in form No. 121.]

[DEMAND OF JUDGMENT.]

§ 603. **Occasion of Dissolution.**—The occasion of the dissolution should be shown.[2]

§ 604. **By Receiver of Mutual Insurance Company on Premium Note.**

Form No. 126.

[TITLE.]

The plaintiff, as receiver of the.....company, complains, and alleges:

[1] The above form is substantially from McCall's Forms, 270, See Cal. Code, sec. 564, subd. 3; N. Y. Code, sec. 244, subd. 5.

[2] Gillet v. Fairchild, 4 Den. 80; see Tuckerman v. Brown, 11 Abb. Pr. 889.

I. That the ..... Insurance Company was at the time hereinafter mentioned a mutual insurance company, duly incorporated as such under and by virtue of an act of the legislature of this state, entitled [title of act], and was duly organized under said act, to make, etc. [State object of incorporation.]

II. That on the ..... day of ....., 18..., at the general term of the superior court, in and for the county of ....., state of California, this plaintiff was appointed receiver of the stock, property, things in action, and effects of the said company [upon the occasion of its voluntary dissolution, or otherwise].

III. That thereafter, and prior to the ..... day of ....., 18..., the plaintiff gave the requisite security as said receiver, and filed the same in the clerk's office of the said county of ....., and thereupon entered upon the duties of his office as such receiver, and is now, as said receiver, in possession of the stock, property, things in action, and effects of the said corporation.

IV. That the defendant made his certain note in writing, commonly called a premium note; and, at the date in said note mentioned, delivered the said note, of which the following is a copy, to the said ..... company. [Copy note.]

V. That said policy of insurance expired in one year from the date thereof, and said note formed part of the capital stock of said company, and which said policy of insurance was issued and delivered to the said defendant at the date mentioned in the said note, and thereby the said defendant became a member of said company, down to and including the time for which said note was assessed by said plaintiff as said receiver, to pay the losses and liabilities of said company, incurred whilst said policy and note were in full force and effect.

VI. That after he had entered on the duties as said receiver, he ascertained the amount of the losses by risks, and other liabilities of said company; and as said receiver, at .... aforesaid, on the ..... day of ....., 18..., did settle and determine the sums to be paid by the several members of said company, as their respective portions of such losses and liabilities, in proportion to the unpaid amount of his or their deposit note or notes, agreeably to the charter and by-laws of said company, and did thereafter on said note assess the sum so settled and determined upon to be paid by the several members of said company, liable to be assessed therefor.

VII. That after the making of the said assessment, as said receiver, he published notice thereof in the ....., a news-

paper published in the county of ....., once in each week for.....days, commencing on the ..... day of ....., 18...., and that previous to the ..... day of ....., 18...., he caused notice to be served on each person assessed, of the amount so settled, determined, and assessed to be paid by him on his premium note, by depositing such notice in the post-office at ....., directed to each person assessed at his place of residence, as far as such place of residence could be ascertained from the books of said company, requiring said assessment to be paid in ..... days after service of such notice.

VIII. That at a term of the superior court of the county of ....., held at the court-house, in the city and county of San Francisco, on the ..... day of ...., 18..., the aforesaid assessment, so made by said receiver on the premium notes of the members of said company, was ratified and confirmed, and the said receiver authorized and directed by said court to bring suits against the several members of said company, who have refused or neglected to make payment of the amount so assessed by plaintiff to be paid on their respective premium notes.

IX. That the said defendant's note aforesaid was assessed, for the purpose aforesaid, to the amount of ..... dollars, and said assessment was made for losses or damages by risks on life [or otherwise] and expenses accrued to said company only while said note and policy of insurance therein mentioned were in full force and effect.

X. That the defendant has not paid the said assessment, or any part thereof.

[Demand of Judgment.][1]

[1] Such a complaint must show the liabilities of the company: Thomas v. Whallon, 31 Barb. 172.

SUBDIVISION SECOND.

IN ACTIONS FOR DEBT.

CHAPTER I.

ACCOUNTS.

§ 605. For Money Due on an Account.

Form No. 127.

[TITLE.]

The plaintiff complains of the defendant, and alleges:

I. That between the ..... day of ..... and the ..... day of ....., 18..., at ....., the plaintiff sold and delivered to the defendant, at his request, certain goods, wares, and merchandise.

II. That the same were reasonably worth the sum of ..... dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 606. The Same—Another Form—Common Count.

Form No. 128.

The plaintiff complains of the defendant, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of ..... dollars, upon an account of goods sold and delivered by the plaintiff to the defendant, at his request, at ....., between the ..... day of ..... and the ..... day of ....., 18...

II. That the same became due and payable on the ..... day of ....., 18.., but the defendant has not paid the same, nor any part thereof [if there have been payments, add "except the sum of ..... dollars"].

[DEMAND OF JUDGMENT.]

§ 607. **Essential Averments.**—At the common law, an allegation in an action on an account, that the defendant is indebted to plaintiff in the sum, etc., for goods sold and delivered on, etc., and that there was then due to the plaintiff from

the defendant said sum, implies a contract, a promise to pay, and that the period when the same was promised to be paid had expired, and constitutes a good *indebitatus* count in debt.[1] An averment of request is not necessary.[2] The allegation of value is material.[3] But an implied promise to pay is matter of law, and should not be pleaded.[4] Where a demand would be necessary if the plaintiff sued for damages for conversion, he must aver a demand where he sues upon the implied contract, waiving the tort.[5] A contract to pay generally, and without time or terms specified, creates a debt payable presently, and no previous call or demand of payment is required, and none need be averred. Bringing the action is a sufficient demand.[6] On an agreement to pay on request, though no request is necessary if the promisor be the principal debtor, it is necessary if he is a surety.[7]

§ 608. **Items of Account.**—In California and many of the other code states, the code contains the following provision: "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after demand thereof, in writing, a copy of the account, or be precluded from giving evidence thereof. The court, or a judge thereof, or a county judge, may order a further account where the one delivered is too general, or is defective in any particular."[8] If the account as delivered is not satisfactory, and the other party intends to object to the introduction of evidence on the subject, an order for its exclusion should be obtained previous to the trial.[9] A count for the value of the use and occupation of plaintiff's land does not prevent a claim upon which a bill of particulars can be required.[10]

In an action to recover many items of demand claimed by one and the same right, the items may be, for the sake of brevity and convenience, thrown into one count.[11] If the action be

[1] 1 Ch. Pl. 345; 2 Id. 142; Emery v. Fell, 2 T. R. 28; Allen v. Patterson, 7 N. Y. 479; see also Hughes v. Woosley, 15 Mo. 492, as to form of complaint on an account.

[2] Acom v. American Mineral Co., 11 How. Pr. 24.

[3] Gregory v. Wright, 11 Abb. Pr. 417.

[4] Farron v. Sherwood, 17 N. Y. 227.

[5] Spoor v. Newell, 3 Hill, 307.

[6] Lake Ontario etc. R. R. Co. v. Mason, 16 N. Y. 451.

[7] Nelson v. Bostwick, 5 Hill, 37.

[8] Code C. P., sec. 454; Conner v. Hutchinson, 17 Cal. 281; P. Tool Co. v. Prader, 32 Id. 638; Goodrich v. James, 1 Wend. 289; N. Y., 1876, sec. 531; Wis. R. S., c. 125, sec. 20; Minn. Code Proc., sec. 92; Col. Code Civil Proc., sec. 64; Nev. Comp. L., sec. 1119; N C. Code Civil Proc., sec. 118; S. C. Code Proc., sec. 181; Florida Code Civil Proc., sec. 103. In other states the copy of the account must be either attached to or incorporated in the pleading.

[9] Kellogg v. Paine, 8 How. Pr. 329.

[10] Moore v. Bates, 46 Cal. 30.

[11] Longworthy v. Knapp, 4 Abb. Pr. 115.

in fact for an accounting, it may be treated as one cause of action of an equitable nature, and stated accordingly.[1]

§ 609. **Mutual, Open, and Current Account—Set-off.**—A "mutual, open, and current account, where there have been reciprocal demands," within the meaning of the statute of limitations, is one consisting of demands upon which each party respectively might maintain an action.[2] If all the items on one side of the account were intended by the parties as payment or credits on account, it is not a mutual, open, and current account where there are reciprocal demands.[3] So where one party is selling to the other party goods from time to time, and charging the same, and the other gives him the money, which he credits on the account as payment, the credit does not make the account mutual within the statute of limitations, and each item is barred in two years after its delivery.[4] But where the defendants delivered to the plaintiffs an article of personal property, for which the latter gave the former credit at a specified valuation, a mutual account was created.[5] In Nevada, it was decided that such a credit would not constitute a mutual account consisting of reciprocal demands, but it would create a mutual account if delivered without any understanding that it should be applied as payment.[6] Mutual accounts are made up of matters of set-off, where there is an existing debt on the one side and a credit on the other; or where there is an understanding, express or implied, that mutual debts shall be satisfied or set off *pro tanto*. A payment made on an account and not intended as a set-off *pro tanto*, does not make a mutual account. Striking a balance converts the set-off into a payment. And until such balance is struck a mutual account exists.[7]

§ 610. **Joint Adventure.**—A bill for an account is the proper remedy for the settlement of the proceeds of a joint adventure, where, in consideration of an outfit and advances made by plaintiff, the defendant agreed to account for and pay over a proportion of the proceeds of his labor and speculation of every kind for a certain period of time, although the parties may not have been technically partners. Nor is it a misjoinder of causes of action to demand in the same action, that defendant account for and refund a proportion of the outfit and advances made by plaintiff as agreed in same contract.[8]

[1] Adams v. Holley, 12 How. Pr. 326.
[2] Warren v. Sweeney, 4 Nev. 101.
[3] Id.
[4] Adams v. Patterson, 35 Cal. 122.
[5] Norton v. Larco, 30 Cal. 132.
[6] Warren v. Sweeney, 4 Nev. 101.
[7] Norton v. Larco, 30 Cal. 126.
[8] Garr v. Redman, 6 Cal. 574.

§ 611. **Partners.**—An action of account at law may be brought by one partner against another,[1] in any business.[2]

§ 612. **Running Accounts.**—In suits on running account, the whole should be included in a single action.[3] Various items of an account, though accrued at different times, may be united.[4]

§ 613. **When Action Lies.**—The action of account lies between merchants between whom there is a privity.[5] Against an attorney for money received from his client.[6] By a *cestui que trust*, against trustee appointed by will for an account.[7] By receiver against his deputy.[8] So, by a sheriff against his deputy.[9] Against a receiver appointed to receive rents and debts of another.[10]

Sufficiency of Common Accounts.—The courts of almost all the states, with the exception of one or two, uphold the sufficiency of the common counts, in actions under the code, in all cases where such forms were sufficient at common law.[11] In Minnesota and Oregon the use of the common count in such connection is not permitted.

§ 615. **By an Assignee on an Account.**

Form No. 129.

[TITLE.]

The plaintiff complains and alleges:

I. That on the ..... day of ....., 18..., at the city of

[1] Co. Lit. 171; 1 Montg. on P. 45; Duncan v. Lyon, 3 Johns. Ch. 351; Atwater v. Fowler 1 Edw. Ch. 417; Ogden v. Astor, 4 Sandf. 313.

[2] See Lanfair v. Lanfair, 18 Pick. 299, overruling *dicta* in McMurray v. Rawson 3 Hill, 59; see, also, Kelly v. Kelly, 3 Barb. 419.

[3] Guernsey v. Carver, 8 Wend. 492; Bonsey v. Wordsworth, 36 Eng. Law & Eq. 283; 18 C. B. 325; Wood v. Perry, 3 Exch. 442.

[4] Dows v Hotchkiss, 10 N. Y. Leg. Obs. 281; Adams v. Holley, 12 How. Pr. 326. As to when separate accounts between the same parties are separate causes of action, and therefore must be separately stated, see Phillips v. Berick, 16 Johns. 136; Stevens v. Lockwood, 13 Wend. 644; Staples v. Goodrich, 21 Barb. 317, and Longworthy v. Knapp, 4 Abb. Pr. 115.

[5] 2 Greenl. Ev. 35; 1 Com. Dig., Ac. A. B.

[6] Breedin v. Kingland 4 Watts, 420; 3 Chit. 883.

[7] Bredin v. Deven, 2 Watts, 95.

[8] 1 Roll. 118–120; 1 Com. Dig. 191.

[9] Id.

[10] 1 Com. Dig. 190; 1 Roll. 116; 6 Mod. 92.

[11] Abadie v. Carrillo, 32 Cal. 172; Wilkins v. Stidger, 22 Id. 235; Magee v. Kast, 49 Id. 141; Merritt v. Glidden, 39 Id. 559; Pavisich v. Bean, 48 Id. 364; Curran v. Curran, 40 Ind. 473; Johnson v. Kilgore, 39 Id. 147; Commissioners v. Verbarg, 63 Id. 107; Bouslog v. Garrett, 39 Id. 338; Noble v. Burton, Id. 206; Gwaltney v. Cannon, 31 Id. 227; Raymond v. Hanford, 6 N. Y. S. C. 312; Fells v. Vesivali, 2 Keyes, 152; Ball v. Futlon Co., 31 Ark. 379; Jones v. Mial, 82 N. C. 252; Emslie v. Leavenworth, 20 Kans. 562; Allen v. Patterson, 7 N. Y. 476; Meagher v. Morgan, 3 Kans. 372; Clark v. Fensky, 3 Id. 389; Carroll v. Paul's Ex'rs, 16 Mo. 226; Farron v. Sherwood, 17 N. Y. 227; Hosley v. Black, 28 Id. 438; Hurst v. Litchfield, 39 Id. 377; Queen v. Gilbert, 21 Wis. 395; Grannis v. Hooker, 29 Id. 65.

[12] Foerster v. Kirkpatrick, 2 Minn. 210; Bowen v. Emmerson, 3 Or. 452.

....., the defendant was indebted to one E. F. in the sum of ..... dollars, on an account for money lent by said E. F. to said defendant, and for money paid, laid out, and expended by said E. F. to and for use of said defendant, and at his request.

II. That thereafter said E. F., assigned said indebtedness to this plaintiff, of which the defendant had due notice.

III. That the defendant has not paid the same, nor any part thereof.[1]

[Demand of Judgment.]

§ 616. **On an Account Stated.**

Form No. 130.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18...., at ....., an account was stated between the plaintiff and the defendant, and upon such statement a balance of ..... dollars was found due to the plaintiff from the defendant.

II. That the defendant agreed to pay to the plaintiff the said balance of..... dollars.

III. That he has not paid the same.

[Demand of Judgment.]

§ 617. **Essential Averments.**—Where the parties to an account have examined it, and agreed upon a certain sum of money as the balance justly due thereon from one party to the other, then such account has become an account stated, and an action thereon is not founded upon the original items, but upon the balance ascertained by the accounting.[2] The material allegations in such action are: 1. That plaintiff and defendant came to an accounting together; 2. On such accounting defendant was found indebted to the plaintiff in a specified sum; 3. Which defendant promised to pay; 4. And has not paid. What constitutes an account stated is a question of law.[3] An averment that one party made a statement of an account and delivered it to the other, who made no objection to it, is not an averment that an account was stated between them. At most, these are matters of evidence, tending to show, but not conclusively, an account stated.[4] Where, after the death of one partner, an account is stated between defendant and the copartnership, admitting a balance due by him for goods sold in the

[1] As to actions by an assignee, see *ante*.

[2] Benites v. Bicknell, 2 West Coast Rep. 359; Orr v. Hopkins, 1 Id. 157.

[3] Lockwood v. Thorne, 11 N. Y. 170; Graham v. Camman, 13 How. Pr. 361.

[4] Emery v. Pease, 20 N. Y. 62.

life-time of the deceased, the surviving partner may recover without averring the death of the other partner, and the survivorship.[1]

A complaint stating that whereas said defendant was justly indebted to plaintiffs in the sum of three thousand dollars, for money paid, laid out, and expended for the use and benefit of said defendant, and at his special instance and request, to wit, at, etc., and on the first day of April, 1857, and in the sum of three thousand dollars, for money found to be due from the defendant to plaintiffs on an account then stated between them; and the said defendant being so indebted to the plaintiffs, afterwards, to wit, on the day and year aforesaid, at the place aforesaid, undertook, and faithfully promised the plaintiffs, to pay the same, etc., and that said sum is due and unpaid, sufficiently states a cause or action.[2] A complaint, although it refers to an account, should indicate the nature and character of the claim, and the period within which it arose.[3]

§ 618. **Account, how Stated, and Effect of.**—The mere rendering of an account does not make a stated one. Yet if it is received, its correctness admitted, balance claimed, or offer made to pay, it becomes a stated account.[4] An account in writing, showing a balance, or that there is none, does not require a signature to make it a stated account.[5] And it is not affected by its balance being introduced into a subsequent account. The complaint must show a demand in favor of the plaintiff acceded to by the defendant.[6] Where a party receives an account, and keeps it for a reasonable time without objecting to it, he will be considered as acquiescing in it, and it will have the force of an account stated.[7] But where a merchant sends an account current to another residing in a different country, and he keeps it through two years without making an objection, it becomes an account stated.[8] Long acquiescence makes an account an account stated.[9] The statement of an account is not conclusive, but throws upon the party claiming error the burden of proving it.[10] But if there have been mutual compromises, it will operate as an estoppel *in pais*.[11] Where accounts bear upon their face "audited and approved," and "certified to be correct," they

[1] Homes v. DeCamp, 1 Johns. 34.
[2] De Witt v. Porter, 13 Cal. 171.
[3] Farcy v. Lee, 10 Abb. Pr. 143.
[4] Toland v. Sprague, 12 Pet. 300.
[5] Baker v. Biddle, Baldw. 394.
[6] Terry v. Sickles, 13 Cal. 427.
[7] Towsley v. Denison, 45 Barb. 490.
[8] Freeland v. Heron, 7 Cranch, 147.
[9] 1 Story Eq. Jur., sec. 526; Schettler v. Smith, 34 N. Y. (2 J. & Sp.) 17; Stenton v. Jerome, 54 N. Y. 480.
[10] Massachusetts Life Ins. Co. v. Carpenter, 49 N. Y. 668.
[11] Kock v. Bonitz, 4 Daly (N. Y.), 117.

become instruments of writing within the meaning of the statute, and are not barred by that portion of the statute of limitations applying to accounts.[1] An account between merchant and merchant, closed by cessation of mutual dealings, does not therefore become an account stated.[2] An account stated alters the nature of the original indebtedness, and has the effect of a new promise.[3] The rule in matters of account is applicable to a private corporate body, engaged in trade, and conducting its affairs by officers and agents.[4]

§ 619. **The Same—"Errors Excepted."**—An account in writing, examined and signed, will be deemed a stated account, notwithstanding it contains the phrase "errors excepted."[5] Accounts stated may be opened, and the whole account taken *de novo*, for gross mistake in some cases; but only when the error affects all the items of the transaction. And when a party goes into particulars he is confined to those items improperly charged, and the remainder of the account must stand.[7]

§ 620. **Opening an Account Stated.**—When an account is settled by the parties themselves, their adjustment is final and conclusive,[8] even as to the guarantor.[9] It is not at all important that the account be made out by one party against the other. When a consignor rendered an account to the consignee, it was a stated account from the time the consignor demanded payment of the balance.[10] So where the agent presented the account.[11] The practice of opening accounts stated is not encouraged, and should only be done on clear proof of error or mistake.[12] But fraud is a sufficient ground to open an account stated.[13] The effect of surcharging and falsifying an account is to leave it an account stated, except so far as it can be impugned.[14] An account can not be reopened by one of the parties without proof of the items, and that some one or more of them ought

[1] Sannickson v. Brown, 5 Cal. 57.
[2] Mandeville v. Wilson, 5 Cranch, 15.
[3] Carey v. P. & C. Petroleum Co., 33 Cal. 694; Holmes v. De Camp, 1 Johns. 34; Allen v. Stevens, 1 N. Y. Leg. Obs. 359.
[4] Bradley v. Richardson, 2 Blatchf. 343.
[5] Branner v. Chevalier, 9 Cal. 353; Troup v. Haight, Hopk. 272.
[6] Branger v. Chevalier, 9 Cal. 353; Hagar v. Thomson, 1 Black. 80.
[7] Branger v. Chevalier, 9 Cal. 353; Perkins v. Hart, 11 Wheat. 237.
[8] Hager v. Thomson, 1 Black. 80.
[9] Bullock v. Boyd, 2 Edw. Ch. 293; [10] Toland v. Sprague, 12 Pet. 300.
[11] Willis v. Fernegan, 2 Atk. 251; Denton v. Shellard, 2 Ves. sen. 239; Murray v. Toland, 3 Johns. Ch. 569;
[12] Wilde v. Jenkins, 4 Paige Ch. 481; Lockwood v. Thorne, 11 N. Y. 170.
[13] 2 Daniell's Ch. Pr. 764.
[14] Pit v. Cholmondeley, 2 Ves. sen. 565; Perkins v. Hart, 11 Wheat. 237; Story's Eq. Pl., sec. 801; 1 Story's Eq. Jur., sec. 523; Bruen v. Hone, 2 Barb. 586; Bullock v. Boyd, 2 Edw. Ch. 293; Phillips v. Belden, 2 Id. 1.

not to have been allowed.[1] If the complaint is verified, and the answer does not charge fraud or mistake, evidence of overcharge is not admissible.[2]

This rule is founded upon the idea that when an account between parties is stated, with debit and credit sides, and the matter in controversy is stated therein, the presumption of law is that the account is correct, unless it is shown that fraud, omission, or mistake exists.[3] An account against the state, certified by the auditor, is conclusive on him only as to the correctness of the statements herein contained.[4]

§ 621. **Erasure.**—An erasure in a settled account, not shown to have been made before its settlement, is sufficient to avoid it.[5] The presumption is that the alteration was made after execution.[6]

§ 622. **For a General Balance of Account.**

Form No. 131.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of .....dollars, for the balance of an account for groceries sold and delivered by the plaintiff to defendant, and for services performed by the plaintiff for the defendant as an accountant, and for commissions of plaintiff on the sale for defendant of various articles of farm produce, and for moneys paid by plaintiff for defendant's use; the whole furnished, done, and performed at the request of the defendant, between the..... day of....., 18..., and the ..... day of....., 18...; that the whole amount and aggregate value of which items is .....dollars, no part of which has been paid, except the sum of ..... dollars, the balance of account first aforesaid still being unpaid.

II. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 623. **Upon an Account for Services.**

Form No. 132.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of....., 18..., at the city of ....., the plaintiff performed work, labor, and services [state the services] for the defendant at his request.

[1] Sutphen v. Cushman, 35 Ill. 186.
[2] Phillips v. Belden, 2 Edw. 1.
[3] Carroll v. Paul, 16 Mo. 226.
[4] State v. Hinkson, 7 Mo. 353.
[5] Prevost v. Gratz, Pet. 364.
[6] Id.; but compare Malarin v. United States, 1 Wall. U. S. 282.

II. That the same were reasonably worth the sum of..... dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 624. **The Same — Another Form — Common Count.**

Form No. 133.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of ..... dollars on an account for the work, labor, and services in [state the service] performed at the request of the defendant at ....., between the ..... day of ....., 18..., and ..... day of ....., 18...

II. That he has not paid the same, nor any part thereof.[1]

[DEMAND OF JUDGMENT.]

§ 625. **Services.** — A (complaint) on an account for services rendered a third person charging an original liability is sufficient.[2]

§ 626. **Time.** — In order to be sufficiently definite and certain, the complaint should show the nature and character of the claim, and the period within which it arose.[3]

§ 627. **The Same—By an Architect.**

Form No. 134.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ....., 18..., at ....., the plaintiff performed work, labor, and services for the defendant, and at his request, as architect, in forming and drawing plans, and making estimates for, and superintending the erection of a row of buildings to be known as Cottage Row, in ..... street, in the city and county of San Francisco.

II. That the said services were reasonably worth the sum of ..... dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 628. **The Same — Another Form — Common Count.**

Form No. 135.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum

[1] This form is sustained by Moffet v. Sackett, 18 N. Y. 522.

[2] Wing v. Campbell, 15 Mo. 275.

[3] Farcy v. Lee, 10 Abb. Pr. 143.

of ..... dollars, on account for work, labor, and services as architect, in forming and drawing plans, and making estimates for, and superintending the erection of a row of buildings to be known as Cottage Row, in ..... street, in the city and county of San Francisco, performed at the request of the defendant between the ..... day of ....., 18..., and the ..... day of ....., 18....

II. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 629. The Same, by a Broker for Commissions.

Form No. 136.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the .... day of ....., 18..., the plaintiff performed services for the defendant at his request, as broker, at the city and county of San Francisco, in the purchase [and sale] of [government bonds, state stock, negotiable securities, real estate, personal property, or otherwise].

II. That such services were reasonably worth the sum of ..... dollars.

III. That the defendant has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 630. The Same—Another Form—Common Count.

Form No. 137.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of ..... dollars, on an account for services as broker in the purchase [and sale] of [government bonds, state stock, negotiable securities, real estate, personal property, or otherwise], performed at the request of the defendant, at the city and county of San Francisco, between the ..... day of ...., 18..., and the ..... day of ....., 18....

II. That the defendant has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 631. By Carrier, Against Consignor, for Freight.

Form No. 138.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ....., 18..., the plaintiff performed work,

labor, and services for the defendant, at his request, in carrying in their vessel, the ....., sundry goods and merchandise from ..... to .....

II. That such services were reasonably worth the sum of ..... dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 632. The Same—Another Form—Common Count.

Form No. 139.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff to the amount of .... dollars, on an account for work, labor, and services, in carrying in their vessel, the ....., sundry goods and merchandise, from ..... to ....., at the request of the defendant, between the ..... day of ....., 18..., and the ..... day of ...., 18...

II. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 633. The Same—Against Consignee.

Form No. 140.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ....., 18..., the plaintiff performed work, labor, and services in carrying in their vessel, the ....., sundry goods and merchandise, from ..... to ....., which were consigned to the defendant and delivered by plaintiff at ....., to the defendant, and by him accepted.

II. That such services were reasonably worth the sum of ..... dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 634. The Same—Another Form—Common Count.

Form No. 141.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff to the amount of ..... dollars, on account for work, labor, and services, in carrying in their vessel, the ....., sundry goods and merchandise, from ..... to ....., which were consigned to the defendant and delivered by plaintiff at .....

to the defendant, and by him accepted, between the.....day of ....., 18..., and the .....day of....., 18.....

II. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 635. **Interest.**—Freight does not bear interest till after demand.[1]

§ 636. **By Editor for Services.**

Form No. 142.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the.....day of....., 18....., and the..... day of....., 18....., at the city and county of San Francisco, the plaintiff performed services for the defendant, at his request, as an editor, in conducting the newspaper of the defendant known as "The.. .....," and in writing and preparing articles and paragraphs for the same.

II. That such services were reasonably worth the sum of .....dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 637. **The Same—Another Form—Common Count.**

Form No. 143.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of.....dollars, on an account for services as an editor in conducting the newspaper of the defendant known as "The .....," and in writing and preparing articles and paragraphs for the same, performed at the request of the defendant, at the city and county of San Francisco, between the.....day of ....., 18....., and the.....day of..... ....., 18.....

II. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 638. **Contributor's Services.**—The furnishing of articles for publication, at the request of the publisher, is not of itself a service for which a promise to pay will be implied. See authorities under the next form.

§ 639. **By Author for Editing and Compiling Book.**

Form No. 144.

[TITLE.]

The plaintiff complains, and alleges:

[1] Schureman v. Withers, Anth. N. P. 230.

I. That between the ..... day of ....., 18..., and the ..... day of ....., 18.., at the city and county of San Francisco, the plaintiff performed work, labor, and services for the defendant, at his request, in compiling and writing a certain book, entitled "The ....." and in preparing the same for the press, and revising and correcting the proofs for the same.

II. That such services were reasonably worth the sum of ..... dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 640. **The Same—Another Form—Common Count.**

Form No. 145

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of ..... dollars, on an account for work, labor, and services, in compiling and editing a certain book, entitled "The ....." and in preparing the same for the press, and revising and correcting the proofs of the same, performed at the request of the defendant, at the city and county of San Francisco, between the ..... day of ....., 18..., and the ..... day of ....., 18...

II. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 641. **Author's Services.**—A stronger case is required to raise an implied promise on the part of the publisher to pay for the services of the author than in the case of other services.[1] We can not, however, see any reason why a stronger case is required to raise an implied promise to pay on the part of publishers, for services rendered them, than for any other class of persons.

§ 642. **For Services and Materials Furnished.**

Form No. 146.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18 ..., and the ..... day of ....., 18 ..., at the city and county of San

1 See, as to the rights of the author without copyright, in Donaldson v. Becket, 17 Parl. Hist. 990; judgment reported in 4 Burr. 2408; Thurlow *arguendo* in Tonson v. Collins, 1 W. Black. 306; Yates *arguendo* Id. 333. This case was never decided. Beckford v. Hood, 7 T. R. 620; and see 627; Chappell v. Purday, 14 Mee. & W. 303; Jeffreys v. Boosey, 30 Eng. L. & E. 1; Wheaton v. Peters, 8 Pet. 591; S. C., 11 Curtis' Decis. 223.

Francisco, the plaintiff performed work, labor, and services for the defendant, at his request, in [insert nature of work], and furnished materials to the defendant in and about the said work, on the like request.

II. That such services and materials were reasonably worth the sum of ..... dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 643. The Same—Another Form—Common Count.

Form No. 147.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of ..... dollars, on an account for work, labor, and services of the plaintiff, performed at the request of the defendant, in [insert nature of work], and for materials furnished by the plaintiff in and about the said work, on the like request, between the ..... day of ....., 18..., and the ..... day of ....., 18..., at the city and county of San Francisco.

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 644. For Tuition Bills.

Form No. 148.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ....., 18..., at the city and county of San Francisco, the plaintiff, at the request of the defendant, performed work, labor, and services in instructing his children in various branches of learning, and furnished them with books, papers, and other things necessary in and about said work, at the like request, and provided them with board, lodging, and other necessaries.

II. That such services and materials furnished were reasonably worth the sum of ..... dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 645. The Same—Another Form—Common Count.

Form No. 149.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of ..... dollars, on an account for the work, labor, and

services performed at the request of the defendant, in instructing his children in various useful branches of learning, and for books, papers, and other necessary things furnished by this plaintiff in and about said work, at the like request, and for the board, lodging and other necessaries for said children, provided by the plaintiff during said time, at the like request, between the ..... day of ....., 18..., and the .... day of ....., 18..., in the sum of ..... dollars.

II. That the defendant has not paid the same, nor any part thereof [except, etc.]

[DEMAND OF JUDGMENT.]

CHAPTER II.

ON AWARDS.

§ 646. On An Award of Arbitrators—Common Form.

Form No. 150.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., disputes and differences existed between the plaintiff and defendant concerning [a demand of the plaintiff for labor and service rendered by him for the defendant at his request], and thereupon, on the day last aforesaid, the plaintiff and defendant agreed, in writing, to submit the same to the award of A. B. as an arbitrator between them, a copy of which said agreement and submission is hereunto annexed, marked "Exhibit A," and made part hereof.

II. That thereafter the said A. B. duly qualified as such arbitrator, and heard the plaintiff and the defendant touching their said matters of dispute, and thereafter, on the ..... day of ....., 18..., at ....., duly made and published his award, in writing, of and concerning the matters so referred, and thereby said arbitrator awarded and declared, that after due appearance before him on behalf of this plaintiff and said defendant, he found that the said defendant was justly indebted to this plaintiff in the sum of ..... dollars, for services aforesaid [or otherwise, according to the fact]; a copy of which said award is hereto attached, marked "Exhibit B," and made part hereof.

III. That the plaintiff duly performed all the conditions of said award on his part, and afterwards, and on or about the

..... day of ....., 18...., at ....., gave notice of said award to the defendant, and demanded of him payment of the said sum of ..... dollars, so awarded to the plaintiff as aforesaid.

IV. That the defendant has not paid the same, nor any part thereof, and there is now due from the defendant to the plaintiff thereon the sum of .... dollars, with interest from the ..... day of ....., 18...

[Demand of Judgment.]

§ 647. **Essential Allegations.**—A complaint on an award must show that the arbitrators conformed to the submission, and the powers of the arbitrators.[1] It was the rule at common law, that the plaintiff need not show the award on both sides, and if there be a condition precedent it need not be alleged.[2] But under the code, performance of the conditions of an award must be pleaded, as well as in the case of a contract.[3] But if the arbitrators award that one of the parties shall pay to the other a certain sum, and also that the parties shall execute to each other mutual releases of all actions, etc., the tender of a release as provided by the award is not a condition precedent to the right to try an action to recover the money.[4] The award of money is absolute and unconditional, but the award of release is different; they are concurrent acts, and neither party can compel the other to execute a release without the tender of a release by him.[5] But where matters awarded to be done are independent, tender or demand before suit need not be averred.[6]

Where the award was required to be delivered to the parties, an allegation that it was ready to be and was delivered to the plaintiff, is not sufficient.[7] Notice of the award and demand need not be alleged, unless required by the terms of the submission.[8] This is not, however, the law in California. There notice must be served on the opposite party before judgment is entered.[9]

§ 648. **Form of Submission—When must be in Writing.**—In California, under section 1282 of the code of procedure, the submission must be in writing. It may be stipulated in the submission that it be entered as an order of the superior

[1] Gear v. Brocken, Burn. (Wis.) 88; Matthews v. Matthews, 2 Curt. C. Ct. 105.

[2] McKinstry v. Solomons, 2 Johns. 57; Diblee v. Best, 11 Id. 104.

[3] Cole v. Blunt, 2 Bosw. 116.

[4] Dudley v. Thomas, 23 Cal. 365.

[5] Dudley v. Thomas, 23 Cal. 365; Cole v. Blunt, 2 Bosw. 116.

[6] Nichols v. Rensselaer Co., 22 Wend. 125.

[7] Pratt v. Hackett, 6 Johns. 14.

[8] Hoadsden v. Horridge, 2 Saund. 62; Rowe v. Young, 2 Brod. & B. 233.

[9] See Code of Civil Procedure, sec. 1286.

court. When so entered it can not be revoked without the consent of both parties, and the award may be enforced in the same manner as a judgment. If the submission is not made an order of court, it may be revoked at any time before the award is made.[1] The clerk must be authorized by the stipulation to make a note in his register, and he must in fact make it there; the mere authority without the act done is no more than the act done without the authority would be. Both these must concur, and in the absence of either there is no jurisdiction.[2] A stipulation that judgment in the district court of, etc., may be rendered upon the award made in pursuance of the submission without a stipulation that the submission shall be entered as a rule of the court, is not sufficient.[3] If the submission is not made a rule of court, an action may be maintained upon the award, as in the case of common-law arbitration. If the submission is not made a rule of court, it may be revoked by either party at any time before the award is made; but the party revoking is liable to an action for the costs and damages of the other party in preparing for and attending the arbitration.[4] In New York an action may be maintained upon the award.[5] But a verbal award will not be valid, unless a verbal submission of the matters on which the award is made would be binding upon the parties.[6] If a submission is attempted to be made under the provisions of the statute, and the same is inoperative for failure to comply therewith, it is not valid as a common-law submission.[7] But a stipulation that neither party shall appeal from an award is not binding.[8]

§ 649. **Who may Make Submission.**—Any person capable of contracting may submit to arbitration any controversy, except a question of title to real property, in fee, or for life.[9] This statute is but an affirmance of the common law, and under it the parties have no higher rights than they might have asserted in a court of equity, in cases of fraud, accident, or mistake.[10] As the submission to arbitration is a contract, the party making the submission must have the power to contract with reference to the subject-matter in dispute. In general an agent has no authority to submit to arbitration unless expressly

[1] See Code C. P., sec. 1283.
[2] Pierrot v. Kennedy, 43 Cal. 395; Ryan v. Dougherty, 30 Id. 218.
[3] Fairchild v. Doten, 42 Cal. 128.
[4] Code C. P., sec. 1290.
[5] Cope v. Gilbert, 4 Denio, 347; Deidrick v. Richley, 2 Hill, 271; Hays v. Hays, 23 Wend. 363.
[6] French v. New, 28 N. Y. 147.
[7] Inhabitants of Deerfield v. Arms, 20 Pick. 480.
[8] Muldrow v. Norris, 2 Cal. 74.
[9] Cal. Code, sec. 1281.
[10] Muldrow v. Norris, 2 Cal. 74; reaffirmed in Peachy v. Ritchie, 4 Cal. 205.

or impliedly empowered by his principal.[1] But an agent authorized to prosecute a suit, has authority to submit to a reference, under a rule of court.[2] And it is the practice throughout the Union for suits to be referred by consent of counsel, without special authority.[3] If, however, an unauthorized submission is ratified by the principal, he is bound thereby.[4]

§ 650. **The Same—Partners—Parties Jointly Interested.**—The great weight of authority is in support of the doctrine that the right to submit a partnership controversy to arbitration is not included within the ordinary course of partnership business, and consequently that one partner, unless expressly authorized, has no such power, so as to bind his copartner.[5] The partner who makes the submission is himself bound by it.[6] Persons jointly interested can not in general bind each other by a submission to arbitration without express authority.[7]

§ 651. **Election of Remedy.**—Where the submission is by bond, the plaintiff has his election to sue on the bond or on the award, if it is merely for the payment of money; but if a collateral thing is awarded, the suit must on the bond, as debt will lie for money only.[8] Where a sum of money is awarded, it is sufficient to set forth only so much of the award as to show a good cause of action.[9] It seems that a clause in a contract providing that in case any dispute should arise in regard to the same it should be settled by arbitrators, is no bar to an action upon the contract.[10]

§ 652. **Judgment upon Award.**—Judgment may be entered on an award without an order of the court.[11] But the award shall be in writing, signed by the arbitrators, or a major-

[1] Trout v. Emmons, 29 Ill. 433.

[2] Buckland v. Conway, 16 Mass. 396.

[3] Holker v. Parker, 7 Cranch, 436; Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83; and see Greene v. Darling, 5 Mason, 201.

[4] Isaacs v. Beth Hamedash Soc., 1 Hilt. 469; Detroit v. Jackson, 1 Doug. (Mich.) 106; Memphis etc. R. R. Co. v. Scruggs, 50 Miss. 284; Furber v. Chamberlain, 29 N. H. 405; Perry v. Mulligan, 58 Ga. 479; Lowenstein v. McIntosh, 37 Barb. 251; Smith v. Sweeney, 35 N. Y. 291.

[5] Jones v. Bailey, 5 Cal. 345; Buchanan v. Curry, 19 Johns. 137; Eastman v. Burleigh, 2 N. H. 384; Southard v. Steele, 8 T. B. Mon. 435; Steiglitz v. Egginton, Holt, 141; Stead v. Salt, 3 Bing. 101; Adams v. Bankart, 1 Comp. M. & R. 681; Karthaus v. Ferrer, 1 Pet. 222; Buchoz v. Grandjean, 1 Mich. 367; Backus v. Coyne, 35 Id. 5; Harrington v. Higham, 13 Barb. 660; Onion v. Robinson, 15 Vt. 510; Martin v. Thrasher, 40 Id. 460.

[6] Jones v. Bailey, 5 Cal. 345; Karthaus v. Ferrer, 1 Pet. 222; Wood v. Shepherd, 2 Patt. & H. (Va.) 442.

[7] Eastman v Burleigh, 2 N. H. 435; Smith v. Smith, 4 Rand. 95; Boyd's Heirs v. McGruder's Heirs, 2 Rob. (Va.) 761. See this subject discussed at length in note to Hutchins v. Johnson, 30 Am. Dec. 626.

[8] Hodsden v. Harridge, 2 Saund. 62.

[9] 1 Ld. Raym. 115.

[10] Binsee v. Paige, 38 N. Y. 87.

[11] Carsley v. Lindsay, 14 Cal. 390.

ity of them, and be delivered to the parties.[1] The court will not disturb the award unless the error complained of, whether of law or of fact, appear upon the face of the award.[2] If a judgment on an award of arbitrators is entered by the clerk, at the request of the party in whose favor it is rendered, within less than five days after the award is filed, and without notice to the other party, the prevailing party can not afterwards question its validity on the ground that it was irregularly entered.[3]

§ 653. **Jurisdiction.**—Where the court has no jurisdiction of a subject-matter, the arbitrators can have none.[4] And the award being void, the release of the action by one of the parties is also void, if filed in pursuance of the submission.[5] A court of equity may decree specific performance of an award.[6] This does not apply to real estate, as no arbitration or award can be made affecting the title to real property in California.[7] Where a party receives the amount of a judgment under an award, it is a waiver on his part of all errors and misconduct on the part of the arbitrators.[8] But a submission to arbitration of title to real estate, being prohibited by statute, is not merely voidable, but is void and incapable of ratification.[9] But, where, under an agreement in writing, parties submit matters of difference relative to the partition of lands to the award of arbitrators, and an award is made thereunder, a specific performance of the award will be decreed.[10] So in New York as to disputed boundaries,[11] and in Ohio.[12]

§ 654. Where there are three arbitrators all shall meet, but two of them may do any act which might be done by all,[13] The arbitrator must make his award within the time limited in the agreement.[14] An allegation that an award was made, imports that it was ready to be delivered.[15] They may select an umpire either before or after investigation, and may award costs.[16] But after an award has been once made and delivered, they can not amend the same without consent of the parties.[17] They shall be sworn, and a majority may determine any question.[18]

[1] California Code, sec. 1286.
[2] Tyson v. Wells, 2 Cal. 122; overruled as to the report of a referee, in Cappe v. Brizzolara, 19 Id. 607.
[3] Hoogs v. Morse, 31 Cal. 128.
[4] Williams v. Walton, 9 Cal. 142.
[5] Muldrow v. Norris, 12 Cal. 331.
[6] Whitney v. Stone, 23 Cal. 275.
[7] Spencer v. Winselman, 42 Cal. 479.
[8] Hoogs v. Morse, 31 Cal. 128.
[9] Wiles v. Peck, 26 N. Y. 42.
[10] Whitney v. Stone, 23 Cal. 275.
[11] Stout v. Woodward, 5 Hun, 340.
[12] Hunt v. Guilford, 4 Ohio, 310.
[13] California Code, sec. 1285; Glass Pendery Min. Co. v. Meyer Min. Co., 1 West Coast Rep. 290.
[14] Ryan v. Dougherty, 30 Cal 218.
[15] Munroe v. Allaire, 2 Cai. 320.
[16] Dudley v. Thomas, 23 Cal. 365.
[17] Dudley v. Thomas, 23 Cal. 365.
[18] California Code, sec. 1285.

Arbitrators have no common-law powers when appointed in the mode provided by statute.[1]

§ 655. **Publication.**—The arbitrator cannot "award" without "publishing" his award, and "publishing" is a technical phrase, merely implying that the arbitrator has finally disposed of the case.[2] And when published, any alteration whatever, without consent of the parties, will vitiate it.[3] Notice of the award need not be averred, unless required by the terms of the submission.[4] No demand need be alleged unless expressly required.[5]

§ 656. **Revocation.**—An agreement to submit a matter to common-law arbitration is, both at law and in equity, revocable before the award is given,[6] and it cannot be made irrevocable by any agreement of the parties.[7] Otherwise, it seems, of a submission by rule of court.[8] After the arbitrators have been sworn, neither of the parties has the right to revoke the submission.[9]

§ 657. **Submission.**—To constitute a submission to arbitration under the statute, so as to give the award the effect of a judgment, the statute must be pursued in the manner in which the submission is filed with the clerk;[10] and the clerk may enter judgment on the award in due time, without any order of the court.[11] And by the statutes of California, the submission to arbitration shall be in writing, and may be to one or more persons.[12]

§ 658. **Vacation of Award.**—The court may, on motion, vacate an award: 1. Where it was procured by fraud or corruption; 2. Where the arbitrators were guilty of misconduct; 3. Where the arbitrators exceeded their powers [13] Or it may modify or correct an award: 1. Where there is a miscalculation in figures; 2. When part of the award is on matters not submitted; 3. When, if it had been the verdict of a jury, it could have been amended, or the imperfection disregarded.[14] As,

[1] Williams v. Walton, 9 Cal. 145.
[2] Brooke v. Mitchell, 6 M. & W. 473.
[3] Porter v. Scott, 7 Cal. 312.
[4] Hodsden v. Harridge, 2 Saund. 62; 6 M. & W. 474.
[5] Rowe v. Young, 2 Brod. & B. 233.
[6] 8 Co. R. 81; Milne v. Gratrix, 7 East, 607; Clapp v. Highum, 1 Bing. 89; King v. Joseph, 5 Taunt. 452.
[7] Tobey v. The County of Bristol, 3 Story C. Ct. 800.
[8] Masterson v. Kidwell, 2 Cranch C. Ct. 669.
[9] Commissioners Montgomery Co. v. Casey, 1 Ohio St. 403; Pellock v. Hall, 4 Dall. 222; Haskell v. Whitney, 12 Mass. 47.
[10] Heslep v. San Francisco, 4 Cal. 1; Carsley v. Lindsay, 14 Id. 390.
[11] See also Ryan v. Dougherty, 30 Cal. 218.
[12] Cal. Code Civil Proc., sec. 1282.
[13] Cal. Code Civil Proc., sec. 1287; Morris etc. Co. v. Salt Co., 58 N. Y. 667.
[14] Cal. Code Civil Proc., sec. 1288.

where the object of the submission is to make an end of litigation, and the award is uncertain and incomplete upon its face, it defeats the object of the submission and must be set aside.[1] Where an award is objected to on the ground that it embraces matters not in fact submitted, it lies with the objecting party to show affirmatively in what the arbitrators have exceeded their duty.[2] An award may be good in part and bad in part.[3]

§ 659. **Valid Awards.**—The rule is that arbitrators must pass upon all matters submitted;[4] and an award which clearly goes beyond the issues submitted is invalid as a whole, where the matter *ultra vires* can not be separated without violating the intent of the parties.[5] It seems that in New York, "that an arbitrator made an award" means a qualified arbitrator, and sufficiently imports that he was duly sworn, where an oath is required.[6] An award rendered upon fair arbitration, and for a long time concurred in, must be held to be conclusive.[7] No award implies no valid award.[8] An award settles forever all matters fairly within the meaning and intention of the submission.[9] An award bad in part, may be enforced for the part that is good, if not attacked for fraud, and the matter is divisible.[10] It must be certain and decisive as to the matters submitted, and thus avoid all further litigation.[11] Unless it is final and conclusive as to the matters submitted, it is not admissible in evidence.[12]

§ 660. **On an Award of an Umpire.**

Form No. 151.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allegation as in preceding form.]

II. That said A. B., before they proceeded upon the said arbitration, on the ..... day of ....., 18...., by writing under their hands, appointed one E. F. to be umpire in the matter so submitted; and the said arbitrators, after hearing the plaintiff and defendant, and not being agreed concerning the matters submitted to them, the said E. F. afterwards undertook said arbitration, and heard the plaintiff and defendant, and on the ..... day ....., 18..., the said arbitrators made their award,

[1] Pierson v. Norman, 2 Cal. 599; Jacob v. Ketcham, 37 Id. 197.
[2] Blair v. Wallace, 21 Cal. 317.
[3] Williams v. Walton, 9 Id. 146; 13 Johns. 364.
[4] Muldrow v. Norris, 12 Cal. 331; Porter v. Scott, 7 Id. 312.
[5] White v. Arthur, 59 Cal. 33.
[6] Browning v. Wheeler, 24 Wend. 258.
[7] Jarvis v. Fountain Water Co., 5 Cal. 179.
[8] Dresser v. Stansfield, 14 M. & W. 822.
[9] Brazill v. Isham, 12 N. Y. 15; Lowenstein v. McIntosh, 37 Barb. 251.
[10] Muldrow v. Norris, 2 Cal. 74.
[11] Jacob v. Ketchum, 37 Id. 167.
[12] Id.

in writing, that the defendant should [pay the plaintiff ..... dollars].

III. That he has not paid the same.[1]

[DEMAND OF JUDGMENT.]

§ 661. Allegation of an Enlargement of the Time

Form No. 152.

[TITLE.]

That on the ..... day of ....., 18...., the plaintiff and defendant, by agreement [in writing, of which a copy is hereto annexed], extended the time for making the award until the ..... day of ....., 18...

§ 662. **Date of Award.**—An award may be counted on as made at the time of its date, not at the time as extended by erasure or interlineation.[2]

§ 663. **Appointment.**—An umpire may be appointed by parol, unless the submission require the appointment to be in writing.[3] Where an umpire has been appointed and has entered on the performance of his duty, the authority to decide is vested solely in him; the original powers of the arbitrators cease to exist.[4]

§ 664. **Power to Award.**—But where two arbitrators, unable to agree, appoint under the submission a third arbitrator, the power to make an award is vested in the three jointly. Wherever, therefore, the action is founded on an award, its true character, as the act of an umpire or of arbitrators, must be set forth in the complaint, in order that a defense adapted to its true character may be set up in the answer.[5]

[1] The above form of complaint does not apply under the practice in California. The report of a referee, and the award of an arbitrator, are in all essentials the same: Grayson v. Guild, 4 Cal. 122.

[2] Tompkins v. Corwin, 9 Cow. 255.

[3] Elmendorf v. Harris, 5 Wend. 516.

[4] Underhill v. Van Cortlandt, 2 Johns. Ch. 339; Butler v. Mayor of N. Y., 1 Hill, 489; Mayor of N. Y. v. Butler, 1 Barb. 325.

[5] Lyon v. Blossom, 4 Duer, 318.

CHAPTER III.

ON EXPRESS PROMISES.

665. On an Express Promise in Consideration of a Precedent Debt.

From No. 153.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 . ., at ....., the defendant was then indebted to the plaintiff in the sum of ..... dollars, for [state what]. In consideration thereof, he then promised to pay to the plaintiff the said sum, on the ..... day of .....

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 666. **Consideration.**—In every action upon a promise to pay, a consideration must be stated.[1] Such a consideration is an essential fact to be proved, and unless proved the plaintiff can not recover.[2] In an action upon a promise to pay money, if the complaint contains no averment of consideration or of indebtedness, except by way of recital, it is insufficient.[3]

§ 667. **Consideration, in Purchase of Land.**—Defendant upon the purchase of certain land from B., agreed in writing as part of the consideration, to pay to plaintiff a debt due to him by B. Plaintiff afterward assented, and verbally agreed to look to defendant for the debt. This was not within the statute of frauds, and plaintiff may recover the debt from defendant.[4] A promise or agreement to convey lands in consideration of the purchaser's paying for them out of the profits, is void, as having no consideration.[5] A promise made under mistake, as to liability, is void.[6]

§ 668. **Consideration—Married Woman.**—The advance of money to the son of a married woman is not a sufficient consideration for her subsequent promise to repay.[7]

§ 669. **Consideration to Third Person.**—An action can be maintained upon a promise made by the defendant, upon a valid consideration to a third person for the benefit of the

[1] Bailey v. Freeman, 4 Johns. 280.
[2] Gyle v. Soenbar, 23 Cal. 538.
[3] Shafer v. Bear River and Aub. W. and M. Co., 4 Cal. 295.
[4] McLaren v. Hutchinson, 22 Cal. 187.
[5] Dorsey v. Packwood, 12 How. U. S. 126.
[6] Offutt v. Parrott, 1 Cranch C. C. 154.
[7] Watson v. Dunlap, 2 Cranch C. C. 14.

plaintiff, although the latter was not privy to the consideration. And a creditor can maintain an action against a person who had received money from his debtor upon a promise to pay the amount to the creditor.[1] Where A., who is indebted to B. promises in consideration of his release by B. to pay the amount to C., who is a party to the arrangement, it is a sufficient consideration to support such promise.[2]

§ 670. Upon Compromise of an Action.

Form No. 154.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ..... an action was pending in the ..... court, brought by the plaintiff to recover from the defendant the sum of ..... dollars, for goods sold by plaintiff to the defendant.

II. That on the ..... day of ....., at ....., in consideration that the plaintiff would discontinue said action, and would accept ..... dollars in satisfaction of his claim, the defendant promised to pay the plaintiff the sum of ..... dollars.

III. That the defendant accordingly discontinued said action.

IV. That no part of said sum has been paid.

[Demand of Judgment.]

§ 671. **Essential Allegations.**—An agreement to compromise, not unconscientious or unreasonable, must be executed, without regard to the merits of the dispute.[3] A complaint on a promise in consideration of a compromise should show that there was some shadow of a claim;[4] though it need not show that the plaintiff had a valid claim.[5] It must also aver that the litigation was discontinued according to the compromise.[6]

§ 672. **Covenant to Sue.**—A covenant not to sue for five years is no bar to the action; but the defendant must rely upon the covenant for his remedy.[7] A covenant not to sue, made to a portion only of joint debtors, does not release any of them.[8]

§ 673. Promise of a Third Person to Pay Money to Plaintiff.

Form No. 155.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., one A. B. was, and ever

[1] Secor v. Lord, 3 Keyes. 525.
[2] Barringer v. Warden, 12 Cal. 311.
[3] Sargent v. Larned, 2 Curt. 340.
[4] Dolcher v. Fry, 37 Barb. 152.
[5] Palmer v. North, 35 Barb. 282.
[6] Dolcher v. Fry, 37 Barb. 152.
[7] Howland v. Marvin, 5 Cal. 501.
[8] Matthey v. Gally, 4 Cal. 62.

since has been, indebted to the plaintiff in the sum of ..... dollars.

II. That on that day, the said A. B. was the holder of a bill of exchange [describe it], then indorsed, and delivered the same to the defendant; in consideration of which the defendant then and there promised A. B. that he would endeavor to collect the same, and that when collected, he would apply the proceeds in payment of said indebtedness of said A. B. to the plaintiff.

III. That afterwards, on the ..... day of ....., the defendant collected and received the same.

IV. That no part thereof has been paid to the plaintiff.

[DEMAND OF JUDGMENT.][1]

§ 674. **Essential Allegations.**—In an action for a breach of an engagement to pay money to A. for the benefit of B., it is not necessary to aver that the defendant had refused to pay to B., as well as to the plaintiff.[2] But on a promise to pay money when collected, collection is a condition precedent, and must be averred.

§ 675. **Vendor of Lands.**—In a case in California, defendant, upon the purchase of certain land from B., agreed with him in writing, as part of the consideration, to pay to plaintiff a debt then due the latter from B. Plaintiff afterwards assented to the arrangement, and verbally agreed with the defendant to look to him for his debt, and release B. It was held, that this agreement was not within the statute of frauds, and gave plaintiff a right of action against defendant for the debt.[4]

§ 676. **When Action Lies.**—*Assumpsit* is the proper form of an action against a guarantor by one who has given credit on the faith of a general promise to be security. The creditor is not confined to an action of deceit.[5] When A., by agreement between him and B., assented to by C., becomes liable to pay the latter a debt originally due to him from B., the assignee of C. may maintain an action for the debt in his own name against A.[6] Defendant being indebted to E. M. & Co., and they to

[1] This form is supported by Delaware and Hudson Canal Co. v. Westchester County Bank, 4 Den. 97. We have, however, changed it by adding to and striking out portions. Money received by a third person, on promise to pay creditor's debt, may be recovered: Goddard v. Mockbee, 5 Cranch C. C. 666.

[2] Rowland v. Phalen, 1 Bosw. 43.

[3] Dodge v. Coddington, 3 Johns. 146.

[4] McLaren v. Hutchinson, 22 Cal. 188. Whether the assent was necessary to fix defendant's liability, see Lewis v. Covillaud, 21 Id. 178.

[5] Lawrason v. Mason, 3 Cranch, 492.

[6] Lewis v. Covillaud, 21 Cal. 178; McLaren v. Hutchinson, 22 Id. 187.

plaintiff, all parties agreed that defendant should pay the amount of his indebtedness to the company to plaintiff. This was an equitable assignment, and the only mode of enforcing it is by action in the name of the assignee to recover the debt.[1]

§ 677. **On a Promise to Pay for the Surrender of a Lease.**

Form No. 156.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the plaintiff leased from the defendant a house and lot in the town of ....., for a term commencing on the ..... day of ....., 18..., and ending on the ..... day of ....., 18..., under which he was entitled to the possession of said house and lot.

II. That on the ..... day of ....., 18..., the defendant promised the plaintiff that in consideration that he, the plaintiff, would surrender to the defendant the unexpired term and the possession, he would pay the plaintiff the sum of..... dollars.

III. That the plaintiff thereupon surrendered the unexpired term of said lease, and the possession of said land to the defendant.

IV. That no part of said sum has been paid.

[DEMAND OF JUDGMENT.]

§ 678. **For the Purchase Money of Land Conveyed.**

Form No. 157.

[TITLE].

The plaintiff complains, and alleges:

I. That on the ..... day of .... 18..., at ....., the plaintiff sold and conveyed to the defendant [the house and lot No. 203 .... street, in the city of .....].

II. That defendant promised to pay the plaintiff ..... dollars for the said [house and lot].

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 679. **Consideration of Deed.**—In New York an action will lie for the consideration of a deed, although there was no valid contract under the statute of frauds,[2] even when the deed contains a receipt for the consideration.[3]

§ 680. **Delivery.**—Under a verbal contract of sale of real estate, the delivery of the title deeds is equivalent to a symbol-

[1] Wiggins v. McDonald, 18 Cal. 126.
[2] Thomas v. Dickinson, 12 N. Y. 364.
[3] Shephard v. Little, 14 Johns. 210; Thomas v. Dickinson, 12 N. Y. 364.

ical delivery of and admission into the possession of the property, as between vendor and vendee.[1]

§ 681. **Request is Implied by the Word "Sold."**[2] A failure on the part of the vendee to pay the purchase money for two years and more, does not forfeit his right under the contract, as the vendor may enforce the payment at any time after it is due.[3]

§ 682. **Allegation of New Promise.**

Form No. 158.

That thereafter, on the ..... day of ....., at ....., in consideration of the foregoing facts the defendant promised to the plaintiff, in writing, that he would pay such indebtedness.

§ 683. **Statute of Limitations—New Promise.**—It is well settled with reference to actions for moneys due on contracts, that the statute does not discharge the debt, or in any way extinguish the right or destroy the obligation, but only takes away a remedy. The debt remains unsatisfied and unextinguished. It is a sufficient consideration to support a new promise.[4] In some of the states, where there is a new promise to pay a continuing debt, although the creditor may sue on the old debt and give the new promise in evidence, he may, on the other hand, sue on the new promise.[5] Where a debtor promises to pay when able, and the creditor does not wait, but proceeds immediately on the original obligation before defendant is able to pay, he can not afterwards resort to an action of *assumpsit* on the new promise. In Iowa the new promise must be alleged.[6] And in Missouri, under the statute of 1845, and in the revision of 1855, the promise or acknowledgment must be in writing, or it is of no effect.[7] In Ohio the rule seems to be that where a new promise or acknowledgment has been made, the plaintiff may state the demand barred, as a consideration of the new promise, and allege the new promise in writing as the cause of action.[8] By the practice in New York the complaint may be made on the original demand, and if the statute of limitations be pleaded, the new promise may be given in evidence without an allega-

[1] Tohler v. Folsom, 1 Cal. 207, and note.

[2] 1 Saund. 264, note 1; Comstock v. Smith, 7 Johns. 87; Parker v. Crane, 6 Wend. 647.

[3] Gouldin v. Buckelew, 4 Cal. 107.

[4] Townsend v. Jemison, 9 How. U. S. 413; Bulger v. Roche, 11 Pick. 37; Lincoln v. Battelle, 6 Wend. 485; Ang. on Lim., p. 268, sec. 213; Chabot v. Tucker, 39 Cal. 434.

[5] Lonsdale v. Brown, 4 Wash. C. Ct. 148.

[6] Id.

[7] Blackburn v. Jackson, 26 Mo. 308.

[8] Sturges v. Burton, 8 Ohio St. 215.

tion.[1] And the same rule applies after a discharge in bankruptcy or insolvency.[2]

When a promise to pay a debt is relied on to take a case out of the statute of limitations, it is not necessary, in pleading, to allege that it was in writing, signed by the party.[3] It is otherwise in California.[4] In that state it is held that where the acknowledgment is made while the contract is a subsisting liability; that is, before it has become barred by the statute, it establishes a continuing contract; but when made after the bar of the statute, a new contract is created. It is not held that the statute raises a presumption of payment, but bars the remedy. That, therefore, when the creditor sues after the statute has barred the original contract, his cause of action is not upon the original contract, but upon the new promise, whether it be in form a new promise, or an implied promise arising from the acknowledgment; the consideration being the original contract, which, though barred by the statute, is binding *in foro conscientiæ*.[5] That the statute acts only on the remedy, and does not raise a presumption of payment.[6] In New York it has been held that where there is a new promise to pay a debt barred by the statute of limitations, it is not necessary to count upon this as a new contract; but the action may be brought upon the original obligation.[7] The time of such new promise must be definitely averred. An averment of repeated acknowledgments will not suffice.[8] The acknowledgment must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay.[9] When the new promise is coupled with a condition, it should be so alleged, and performance must be averred.[10]

§ 684. **Request.**—Allegation that plaintiff refused, etc., though then and there particularly requested to do so, is a sufficiently explicit allegation of a request to amount to a positive averment.[11] Where the agreement is to pay on request the debt of another, if he does not pay on the day, a special request must be averred. The general allegation "though often requested" is not enough.[12]

[1] Esselstyn v. Weeks, 12 N. Y. 635. Clark v. Atkinson, 2 E. D. Smith. 112.
[2] Shippey v. Henderson, 14 Johns. 178; Depuy v. Swart, 3 Wend. 135.
[3] Lynch v. Musgrave, Hayes & J. 821.
[4] Porter v. Elam, 25 Cal. 291.
[5] McCormick v. Brown, 36 Cal. 180; Chabot v. Tucker, 89 Ill. 488.
[6] See Johnson v. Albany etc. R. R. Co., 54 N. Y. 416.
[7] Van Alen v. Feltz, 9 Abb. Pr. 277; Sands v. St. Johns, 23 How. Pr. 140.
[8] Bloodgood v. Bruen 8 N. Y. 362.
[9] McCormick v. Brown, 36 Cal. 185, and cases there cited.
[10] Wait v. Morris, 6 Wend. 394.
[11] Supervisors of Allegany v. Van Campen, 3 Wend. 48.
[12] Bush v. Stevens, 24 Wend. 256.

CHAPTER IV.

GOODS SOLD AND DELIVERED.

§ 685. Goods sold and Delivered.

Form No. 159.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 .. [or between two dates, naming them], at ....., the plaintiff sold and delivered to the defendant, at his request, certain goods, to wit [describe the property sold, briefly, at least as to its general character].

II. [Allege the price agreed to be paid, or the reasonable value of the goods, as the case may be.]

III. That the defendant has not paid the said sum, nor any part thereof [if any payments have been made, add, except, etc., stating payments].

[DEMAND OF JUDGMENT.]

§ 686. The Same—Another Form—Common Count.

Form No. 160.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 ... [or between two dates, naming them], at ....., the defendant was indebted to the plaintiff in the sum of ..... dollars, on an account for goods [describe the property sold briefly, at least as to its general character] sold and delivered by the plaintiff to the defendant on the day aforesaid [or between the dates aforesaid] at his request.

II. That the defendant has not paid the said sum, nor any part, thereof [if any payments have been made, add, except, etc., stating payments].

[DEMAND OF JUDGMENT.]

§ 687. Essential Allegations—Amount Due.—The failure to state the amounts due, severally, for goods and for money, in a confession of judgment, would be fatal.[1]

§ 688. The Same—At his Request.—The averment, "at his request," is not requisite in New York.[2]

§ 689. The Same—Description of Goods.—A party must be presumed to know what was intended by his account, and

[1] Cordier v. Schloss, 18 Cal. 576. Pr. 24; Glenny v. Hitchins, 4 Id. 98;
[2] Acome v. Amer. Min. Co., 11 How. Victors v. Davis, 1 Dowl. & L. 986.

therefore, where a bill of sale is set forth *in hæc verba*, it remedies a defect in the description of the quantity of goods sold.[1]

§ 690. **The Same—Implied Promise.**—The implied promise to pay is matter of law, and should not be pleaded.[2] Under a count for goods sold and delivered, the plaintiff may show that his chattels had been wrongfully converted by a sale of them by the defendant, who had received the money therefor, or he may waive the tort and sue for goods sold.[3]

§ 691. **The Same—Common Counts.**—A count in the ordinary form of counts in *indebitatus assumpsit* for goods sold and delivered, is sufficient.[4] Thus, an allegation that the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that defendant has not paid for the same, states a cause of action.[5] A complaint alleging that between specified days the plaintiff sold and delivered to defendant, at his special instance and request, a large quantity of boots and shoes of a specified value, and that there is due and unpaid therefor a sum designated, which he promised to pay, but though often requested by them, has wholly refused, is sufficient on demurrer.[6] But a declaration is insufficient which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery of the articles to the defendant, nor show in what place or what manner the indebtedness accrued, whether on account of the defendant or that of another.[7]

In a complaint in an action by several plaintiffs, to recover for goods sold and delivered, an allegation of partnership is not necessary, and an allegation of sale and delivery sufficiently implies that the goods belong to the plaintiff.[8] That the plaintiff had purchased a quantity of goods from W. & P., then and there acting as agents of the defendant, is only another form of declaring that he had purchased from the defendant, and is good on demurrer. Where the complaint sets forth *in hæc verba* the bill of sale, it was held to remedy a defect in the description of the quantity of goods sold.[9]

§ 692. **The Same—Short Form.**

Form No. 161.

[TITLE].

The plaintiff complains, and alleges:

[1] Cochran v. Goodman, 3 Cal. 244.
[2] Farron v. Sherwood, 17 N. Y. 227.
[3] Harpending v. Shoemaker, 37 Barb. 270.
[4] Freeborn v. Glazer, 10 Cal. 337; Abadie v. Carrillo, 32 Cal. 172; Magee v. Kast, 49 Id. 141; Allen v. Patterson, 7 N. Y. 476; Higgins v. Germaine, 1 Mon. 230; see *ante*, sec. 613.
[5] Abadie v. Carrillo, 32 Cal. 172.
[6] Phillips v. Bartlett, 9 Bosw. 678.
[7] Mershon v. Randall, 4 Cal. 324.
[8] Phillips v. Bartlett, 9 Bosw. 678.
[9] Cochran v. Goodman, 3 Cal. 244.

I. That on the ..... day of ....., 18... [or between certain dates, naming them], the defendant was indebted to the plaintiff in the sum of ..... dollars, on an account for goods then sold and delivered by the plaintiff to the defendant at .....

II. That he has not paid the same nor any part thereof.[1]

[DEMAND OF JUDGMENT.]

§ 693. **Balance of Account for Goods Sold.**—Where a complaint stated a cause of action for goods sold, and in addition, with a view to meet a probable defense of payment based upon the giving of certain notes by defendant, and a receipt in full by plaintiff, stated the making of the notes and receipt, and alleged facts attending the transaction, which, if true, avoided its effect as payment, by reason of fraud and misrepresentation on the part of the defendant, it was held, that the allegations of the complaint in reference to the transaction claimed to operate as payment, were not material allegations requiring a denial, and were not, therefore, admitted by the failure of defendant to deny them.[2]

§ 694. **Nature of Claim.**—The complaint should indicate the nature and character of the claim, and the period within which it arose.[3]

§ 695. **For Goods Sold and Delivered at a Fixed Price.**

Form No. 162.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., he sold and delivered to the defendant [fifty casks of sugar, or other goods, describing them].

II. That the defendant then promised to pay..... dollars for the said goods [in gold coin of the United States].

III. That he has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 696. **Debt, when Due.**—It is not necessary to specify any time at which the debt was to be paid.[4] A general promise is to be construed as a promise to pay immediately.[5] And if the promise was to pay at a certain time not yet elapsed, it is matter of defense.[6] But if a day was fixed, it will, if stated, furnish a day for the commencement of interest.[7]

[1] This form is supported by Allen v. Patterson, 7 N. Y. 476; Adams v. Holley, 12 How. Pr. 326; Cudlipp v. Whipple, 4 Duer, 610; Graham v. Camman, 5 Id. 697; Chamberlain v. Kaylor, 2 E. D. Smith, 134.

[2] Canfield v. Tobias, 21 Cal. 359.

[3] Farey v. Lee, 10 Abb. Pr. 143.

[4] Peets v. Bratt, 6 Barb. 622; Gibbs v. Sotham, 5 Barn. & Adol. 911.

[5] Peets v. Bratt, 6 Barb. 622; Gibbs v. Sotham, 5 Barn. & Adol. 911.

[6] Smith v. Holmes, 19 N. Y. 271.

[7] Van Rensselaer v. Jewett, 2 N. Y. 140.

§ 697. **Demand.**—No demand is necessary.[1] On an agreement to pay on request, though no request is necessary, a demand is necessary if the promisor be a surety.[2] But upon a state of facts in which a demand would be necessary if the plaintiff sued for damages for conversion, it is equally necessary where he sues upon the implied contract, waiving the tort.[3] The averment of the demand is proper, to fix the time of interest.[4]

§ 698. **Gold Coin.**—Where there is a verbal understanding that the price of the goods sold shall be payable in gold coin, it may be enforced, if after the debt has accrued and suit has been commenced, one of the firm, in the firm name, makes a contract in writing to pay in gold coin, said contract dated before the sale of such goods, provided the complaint avers a contract to pay in gold, made before the goods were sold.[5]

§ 699. **Hæc Verba.**—When the complaint sets forth *in hæc verba* the bill of the articles purchased, it is sufficient to inform the defendant with what he is charged, for he is presumed to know what is intended by his own account. And it was held to remedy a defect in the description of the quantity of goods sold.[6]

§ 700. **The Same, at a Reasonable Price.**

Form No. 163.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ...., he sold and delivered to the defendant [describe the articles].

II. That the same were reasonably worth ..... dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 701. **Debt Due.**—It is not necessary to show that the debt was due before the commencement of the action, nor even at the date of the complaint.[7]

§ 702. **Promise.**—The promise to pay alleged in the common count in *assumpsit* was a mere conclusion of law from the facts stated, and need not be averred under the code, which requires only the facts to be stated.[8] From the indebtedness admitted, the law implies a promise to pay, and the denial of

[1] Gibbs v. Southam, 5 Barn. & Adol. 911; Lake Ontario R. R Co. v. Mason, 16 N. Y. 451.

[2] Nelson v. Bostwick, 5 Hill, 37; Douglass v. Rathbone, Id. 145.

[3] Spoor v. Newell, 3 Hill, 307.

[4] Beers v. Reynolds, 1 Kern. 97.

[5] Meyer v. Kohn, 29 Cal. 278; see Cal. Code C. P., sec. 667.

[6] Cochran v. Goodman, 8 Cal. 245.

[7] Smith v. Holmes, 19 N. Y. 271.

[8] Wilkins v. Stedger, 22 Cal. 232.

any express promise raises no issue.[1] The law implies a promise to pay so much as the goods are reasonably worth. This is, however, a matter of law and should not be pleaded.[2]

§ 703. **Value, Allegation of.**—The allegation of value is material.[3]

§ 704. **The Same, on Specified Price and Credit.**

Form No. 164.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff sold and delivered to the defendant, at his request [describe articles], for the sum of .... dollars.

II. That the defendant promised to pay therefor to the plaintiff the said sum of ..... dollars, on or before the ..... day of ....., 18.....

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 705. **Demand, Averment of.**—The object of averring a demand is simply to carry interest. It has been held in New York that where goods are purchased at a price fixed, and without fixing any term of credit, if, after reasonable time elapses, the account is presented and impliedly admitted, interest is properly chargeable from the time of the demand.[4]

§ 706. **The Same, by Assignee for Price of Stock and Fixtures of Store and Good Will, Payable by Installments.**

Form No. 165.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 .., at ....., one A. B. sold and delivered to the defendant the stock and fixtures of the grocery store, No....., in ..... street, in..... ....., the property of said A. B., and bargained, sold, and relinquished to the defendant the good will of the business theretofore carried on by the said A. B.

II. That the defendant promised to pay to the said A. B. therefor the sum of ..... dollars, in five equal monthly installments, the first installment to be paid on the ..... day of ...., 18..., and the remaining installments to be paid on the ..... day of each succeeding month, until all shall be paid.

[1] Levison v. Schwartz, 22 Cal. 229.

[2] Gregory v. Wright, 11 Abb. Pr. 417.

[3] Farron v. Sherwood, 17 N. Y. 230.

[4] Beers v. Reynolds, 11 N. Y. 97-102; affirming S. C., 32 Barb. 288.

III. That the defendant has not paid the same, nor any part thereof.

IV. [Allege assignment to plaintiff.]

[DEMAND OF JUDGMENT.]

§ 707. **Good Will.**—Good will of a trade is the probability that the business will continue in the future as in the past, adding to the profits of the concern, and contributing to the means of meeting its accruing engagements, and is an element to be considered in determining whether at a given date the parties conducting the business were solvent. It is a part of the partnership property, and adds to the value of property and stock, and will accompany the sale.[1] Plaintiff having bought certain horses of defendant, as also the "good will" of a mercantile house in the matter of drayage, can not sue to recover back the purchase money on the ground that such "good will" is not vendible.[2]

§ 708. **The Same, by a Firm in which there is a Dormant Partner, the Price being Agreed upon.**

Form No. 166.

[STATE AND COUNTY.] [COURT.]

A. B., J. H., and J. C. J.,
Plaintiffs,
against
JOHN DOE, Defendant.

The plaintiffs complain of the defendant, and allege:

I. That the plaintiffs are copartners in business in the city of San Francisco, under the firm name of B. & H., and that said plaintiff, J. C. J., is a dormant partner in said firm.

II. That on or about the ..... day of ....., 18..., the said plaintiffs, in their firm name, sold and delivered to defendant a certain quantity of merchandise, to wit, dry goods, in the quantities and at and for the prices specified in the bill thereof, hereto annexed, marked "Exhibit A," and made part of this complaint, amounting to the sum of ..... dollars.

III. That defendant promised to pay the same at the expiration of four months from the said date of sale.

IV. That said time has elapsed, and the said defendant has not paid the same or any part thereof.[3]

[DEMAND OF JUDGMENT.]

[1] Bell v. Ellis, 33 Cal. 620.

[2] Buckingham v. Waters, 14 Cal. 146.

[3] As to the necessity of joining the dormant partner as plaintiff, see *ante*, sec. 142. That a dormant party is a necessary party plaintiff, see Secor v. Keller, 4 Duer. 416; compare Belshaw v. Colie, 1 E. D. Smith, 213.

§ 709. **For Goods Delivered to a Third Party at Defendant's Request, at a Fixed Price.**

Form No. 167.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 ..., at ....., he sold to the defendant [two hundred bags of coffee], and at the request of the defendant, delivered the same to one A. B.

II. That the defendant promised to pay to the plaintiff ..... dollars therefor.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 710. **Delivery.**—When goods sold are delivered to a third person for the exclusive use of such person, the plaintiff, in an action against the purchaser, is bound to aver delivery to the third party in the complaint. It is only as a conclusion of law that such a delivery amounts to a delivery to the purchaser.[1] But a variance in this respect may be disregarded if the defendant does not appear to have been misled.[2]

§ 711. **Who Liable.**—That person is liable to whom the creditor at the time gave the credit.[3] But if the credit is not given to the person making such agreement, his undertaking is collateral, and must be in writing.[4]

§ 712. **For Goods Sold, but not Delivered, Price Fixed.**

Form No. 168.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 ..., at ....., he sold to the defendant [all the potatoes then growing on his farm in .....].

II. That defendant promised to pay plaintiff ..... dollars for the same.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[1] Smith v. Leland, 2 Duer, 497.
[2] Rogers v. Verona, 1 Bosw. 417; Briggs v. Evans, 1 E. D. Smith, 192;
[3] Storr v. Scott, 6 Carr. & P. 241; Chit on Cont. 226; Story on Agency, 213, sec. 263; Smith's Merc. L. 212.
[4] Dixon v. Frazee, 1 E. D. Smith, 32; Briggs v. Evans, Id. 192.

CHAPTER V.

GUARANTIES.

§ 713. Against Principal and Sureties on Contract for Work.

Form No. 169.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of ...., 18..., at....., certain articles of agreement were made and entered into between the plaintiff and the defendants under their respective hands and seals, and bearing date the ..... day of..... 18....,of which the following is a copy [insert copy].

II. That the plaintiff afterwards duly performed all the conditions of the said contract on his part, and that the same was fully completed on the.....day of ...., 18..., and that on that day he was entitled to have and receive from the said defendants, upon the said contract, for the said work, mentioned in the said agreement, a large sum of money, viz., the sum of ..... dollars.

III. That the said defendants have wholly failed to perform the said contract on their parts.

IV. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 714. Absolute, Conditional, and Continuing Guaranties—Demand.—A mere offer to guarantee is not binding until notice of its acceptance is communicated by the guarantee to the guarantor, but an absolute guaranty is binding upon the guarantor, without notice of acceptance.[1] In cases of a clear and absolute guaranty, demand on the principal and notice to the guarantor is not necessary.[2] But the guarantor is to pay, in case the principal fails to pay on demand, a demand is necessary, and must be averred and proved.[3] If one guarantees a debt to be collected by himself, demand on the principal debtor need not be shown; otherwise on a demand against one who merely guarantees a debt where the creditor is to collect.[4] Thus

[1] Cal. Civil Code, sec. 2795.

[2] Allen v. Rightmere, 20 Johns. 365; Mann v. Eckford's Ex'rs, 15 Wend. 502; Kemble v. Wallis, 10 Id. 374; Rushmore v. Miller, 4 Edw. Ch. 84; Van Rensselaer v. Miller, Hill & D. Supp. 237; McKenzie v. Farrell, 4 Bosw. 192; but compare Mechanics' Fire Ins. Co. v. Ogden, 1 Wend. 137; Morris v. Wadsworth, 11 Id. 100.

[3] Douglass v. Rathbone, 5 Hill, 143; Bank of N. Y. v. Livingstone, 2 Johns. Cas. 409; Nelson v. Bostwick, 5 Hill, 37; Bush v. Stevens, 24 Wend. 256.

[4] Milliken v. Byerly, 6 How. Pr. 214.

in an action where the plaintiff guaranted that certain certificates of stock should pay ten per cent per annum, an averment that no dividend was made was insufficient. The undertaking was collateral, and in all such cases a demand and notice must be averred.[1] On a general guaranty that debtor will pay, demand on the principal is not necessary to fix the liability of the surety, except for laches of the creditor.[2] So where demand would be useless, as where the principal debtor is insolvent.[3]

The liability of a conditional guarantor is commensurate with that of his principal, and he is no more entitled to notice of a default, unless the act is beyond his inquiry.[4] Where the liability of the guarantor depends upon an action against the principal, it is only necessary to show a suit against the principal.[5] Where one guarantees the debt of another in consideration of a stay of proceedings against the debtor, the promise of the creditor is a condition precedent, and its performance must be alleged in an action against the guarantor.[6] Upon a guaranty that the judgment is collectible, proceedings for the collection in due course of law is a condition precedent, and its performance must be shown, or excuse for its non-performance.[7]

When, by the terms of the guaranty, it is evident the object is to give a standing credit to the principal, to be used from time to time either indefinitely or until a certain period, then the liability is continuing; but when no time is fixed, and nothing in the instrument indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time, whether the amount is limited or not.[8] The intention of the parties must be ascertained and carried into effect, and in arriving at that intent, the language of the contract must be construed according to its plain and obvious import.[9] In case of ambiguity, the language is to be construed most strongly against the guarantor.[10]

§ 715. **Consideration.**—A guaranty must be in writing, but the consideration need not be stated.[11] And it is confined to

[1] Hunk v. Crittenden, 2 McLean, 557.

[2] Clark v. Burdett, 2 Hall, 217; Union Bank v. Coster's Executors, 3 Comst. 203.

[3] Morris v. Wadsworth, 11 Wend. 100; see also Cooke v. Nathan, 16 Barb. 342.

[4] Douglass v. Howland, 24 Wend. 35.

[5] Morris v. Wadsworth, 17 Wend. 103; but see Cooke v. Nathan, 16 Barb 342: see, also, Prentiss v. Garland, 64 Me. 155.

[6] Christ v. Burlingame, 62 Barb. 351.

[7] Mains v. Haight, 14 Barb. 76.

[8] Christ v. Burlingame, 62 Barb. 351; Doscher v. Shaw, 52 N. Y. 602; Sickle v. Marsh, 44 How. Pr. 91. As to liability of guarantors, generally, see Cal. Civil Code, secs. 2801–2815.

[9] Smith v. Compton, 6 Cal. 24.

[10] Id.

[11] Packard v. Richardson, 17 Mass. 122.

the person or persons to whom addressed to give a credit on it. A guaranty not under seal nor expressing consideration, made contemporaneously with the contract guaranteed, is a part of the contract, and the expression of the consideration in the guaranty takes the contract out of the statute of frauds.[2] Thus a guaranty indorsed on a charter party at the same time with its execution, and the consideration of one being in fact the consideration of the other, is good.[3] The charter party referred to in the guaranty becomes part thereof. But if the guaranty were executed subsequently, it would fail for want of consideration, or of the expression of consideration.[4]

§ 716. **Guaranty by Factor.**—A factor who charges his principal with a guaranty commission upon a sale, thereby assumes absolutely to pay the price when it falls due, as if it were a debt of his own, and not as a mere guarantor for the purchaser; but he does not thereby assume any additional responsibility for the safety of his remittances of the proceeds.[5]

§ 717. **Joinder of Parties.**—In New York it is held that the principal and sureties who engage by different instruments, although written upon the same paper, should not be joined as parties in one action.[6] So a claim against a debtor on a sealed contract, and one against a guarantor by another sealed instrument in the paper, can not be united,[7] as the original liability and the guaranty are separate contracts.[8] But they may be joined when they engage by one instrument.[9] In Iowa, under a similar statute, the contrary is held.[10] In California they may be joined whether the liability is created by the same or separate instruments.[11]

§ 718. **Promise in Writing.**—It need not be alleged in the complaint that the promise of the guarantor was in writing.[12] A parol guaranty of the payment or collection of a note, given on its transfer in payment for property purchased, or debt due by the guarantor, is not within the statute of frauds, but may be enforced.[13] An agent authorized to sell a note, and not lim-

[1] Taylor v. Wetmore, 10 Ohio, 490.
[2] Jones v. Post, 6 Cal. 102; see Civil Code, sec. 2792; Ellenwood v. Fults, 63 Barb. 321.
[3] Hazeltine v. Larco, 7 Cal. 82.
[4] Id.
[5] California Civil Code, sec. 2029.
[6] Allen v. Fosgate, 11 How. Pr. 218; overruling Enos v. Thomas, 4 Id. 48.
[7] De Ridder v. Schermerhorn, 10 Barb. 638.
[8] Brewster v. Silence, 4 Seld. 207; overruling Enos v. Thomas, 4 How. Pr. 48.
[9] Carman v. Plass, 23 N. Y. 286.
[10] Marvin v. Adamson, 11 Iowa, 371.
[11] Code of Civil Procedure, sec. 383.
[12] 1 Ch. Pl. 270; Wakefield v. Greenhood, 29 Cal. 597.
[13] Lossee v. Williams, 6 Lans. 228.

ited by instructions, can bind his principal by a guaranty that it is good or collectible.[1]

§ 719. **On an Agreement to be Answerable for the Price of Goods Sold.**

Form No. 170.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., in consideration that the plaintiff, at the request of the defendant, would sell to one A. B., on a credit of ..... months, such goods as said A. B. should desire to buy of this plaintiff, the defendant promised to be answerable to the plaintiff for the payment by said A. B. of the price of goods so sold on credit.

II. That the plaintiff afterwards, and on the faith of said guaranty, sold and delivered to said A. B. [describe the goods], for the sum of ..... dollars, upon a credit of ..... months, of all of which the defendant had notice.

III. That payment of the same was thereafter demanded from said A. B., but the same was not paid.

IV. That notice of such demand and non-payment was given to the defendant.

V. That on the ..... day of ....., 18..., at ...., payment of the same was demanded by the plaintiff from the defendant.

VI. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 720. **Form of Guaranty.**—"Mr. H., Sir: You can let D. have what goods he calls for, and I will see that the same are settled for. Yours truly, H. S. B."—is a continued guaranty.[2]

Where a vendor of shares of fruit, growing in an orchard, guaranteed the vendee that he should collect the fruit without disturbance and annoyance, and the vendee was subsequently prevented from gathering all the fruit by third persons, the vendee has a right of action against the vendor on his guaranty, as he was not bound to take a portion of his contract.[3] But

[1] Lossee v. Williams, 6 Lans. 228. As to the sufficiency and validity of parol promises, as original and independent contracts, to exclude the operation of the statute of frauds, determined in cases depending on particular facts, see Clifford v. Luhring, 69 Ill. 401; Bunting v. Darbyshire, 75 Id. 408; Horn v. Bray, 55 Md. 555; Wills v. Brown, 118 Mass. 137; Walker v. Hill, 119 Id. 249; Booth v. Eighmie, 60 N. Y. 238; Townsend v. Long, 77 Pa. St. 143. For action against principal and sureties on promissory note, and against guarantors thereon, see Promissory Notes, *post*.

[2] Hotchkiss v. Barnes, 34 Conn. 27.

[3] Dabovich v. Emeric, 12 Cal. 171.

where the one person wrote, "Let M. (the writer's brother) have what goods he may want, on four months, and he will pay as usual," it was held to be merely an expression of confidence, and not a guaranty.[1]

§ 721. **Good or Collectible.**—A guaranty to the effect that an obligation is good, or is collectible, imports that the debtor is solvent, and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence.[2] Such guaranty is not discharged by an omission to take proceedings upon the principal debt, or upon any collateral security for its payment, if no part of the debt could have been collected thereby.[3]

§ 722. **Liability, Limitation of.**—Where one guarantees in writing the debt of another for goods sold and delivered, by the guaranty the defendant becomes the debtor of plaintiff, and no limitation could defeat the action, except that prescribed for indebtedness evidenced by the written guaranty.[4] A delay of three years in giving notice that a guaranty in similar terms has become operative, discharges the guarantor.[5]

§ 723 **Notice—Pleading.**—Where the guaranty relates to a bill of goods, the guarantor must be immediately notified of the acceptance of the guaranty,[6] to be given in a reasonable time.[7] In some of the states, the guarantor is entitled to notice that his guaranty has been accepted.[8] On a guaranty of prompt payment an allegation that the guarantor has not paid is essential. Merely alleging that the principal debtor has not paid is insufficient.[9]

§ 724. **Against Guarantor of Mortgage to Recover Deficiency after Foreclosure.**

Form No. 171.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the ..... day of ....., 18.., the defendants entered into an agreement with the plaintiff, under their their hands and seals, in the words and figures following: [Copy agreement.]

II. That the principal sum secured by the note and mortgage referred to in the said agreement, became due and payable on

[1] Eaton v. Mayo, 118 Mass. 141.
[2] Cal. Civil Code, sec. 2800.
[3] Cal. Civil Code, sec. 2801.
[4] Whiting v. Clark, 17 Cal. 407.
[5] Whiting v. Stacy, 15 Gray, 270.
[6] Taylor v. Wetmore, 10 Ohio, 490.
[7] Mussey v. Rayner, 22 Pick. 223; Norton v. Eastman, 4 Greenl. 521; Tuckerman v. French, 7 Id. 115; Babcock v. Bryant, 12 Pick. 133; Beckman v. Hale, 17 Johns. 134.
[8] Oaks v. Weller, 13 Vt. 106; Hank v. Crittenden, 2 McLean, 557; How v. Nichols, 9 Shep. 175; Hill v. Colvin, 4 How. (Miss.) 231.
[9] Roberts v. Treadwell, 50 Cal. 520.

the ..... day of ....., 18..., and that on or about, etc., the plaintiff commenced an action in the superior court of the county of ....., in this state, for the foreclosure of the said mortgage; and such proceedings were thereupon had; that on the ..... day of ....., 18..., a decree was made by the said court, for the foreclosure of the said mortgage and sale of the premises; and that if the proceeds of such sale should be insufficient to pay the amount reported due to the plaintiff, with interest and costs, the amount of such deficiency should be specified in the report of sale therein, and W., one of the defendants therein, should pay the same to the plaintiff.

III. That pursuant to said decree or judgment-order, the premises were duly sold on, etc., by the sheriff of, etc., for the price or sum of, etc. [and that the plaintiff became the purchaser thereof].

IV. That upon said sale, there occurred a deficiency of, etc., as appears by the sheriff's report of said sale, duly filed in the office of the clerk of, etc., and that thereupon, to wit, on the ..... day of ....., 18..., a judgment was rendered in said court against W. in favor of the plaintiff, for the said sum of, etc., with interest from ....., 18..., of which no part has been paid.

V. That before the commencement of this action, he demanded of the defendants payment of the amount of such deficiency, and at the same time tendered to them an assignment of said judgment against W., duly executed by the plaintiff, but that the defendants refused to pay the same, and have ever since neglected and refused to pay to same, although the plaintiff has always been, and still is, ready and willing to deliver to said defendants an assignment of said judgment upon being paid the amount due thereon.[1]

[Demand of Judgment.]

§ 725. **Action may be on the Note.**—That a mortgage given to secure the payment of several notes falling due at different times, provides for payment at times or in modes different from the notes, is no objection to suit on the notes at their maturity. The mortgage is no part of the contract of indebtedness.[2]

§ 726. **Demand of Judgment.**—If the sheriff returns the amount due, and the plaintiff has not been fully paid by the

[1] This form is from "Abbott's Forms," vol. 1, p. 295, and is sustained by Goldsmith v. Brown, 35 Barb. 485, but the recovery is limited by the sum actually paid.

[2] Robinson v. Smith, 14 Cal. 95. As to actions against administrators and executors, see *ante*, sec. 417 et seq.

sale of the mortgaged property, the clerk, without further order of the court, dockets the judgment for the balance due against those defendants named in the judgment as personally liable for the debt, upon which docketed judgment execution may issue.[1]

§ 727. **Interest.**—Where the assignee of a mortgage agreed to waive his lien in favor of one who had agreed to advance money to replace buildings destroyed by fire, but no agreement at the time was made as to interest, the guaranty of the assignee extended no further than the contract, and as this was silent as to the interest, a higher rate of interest than the law allowed could not be collected.[2]

§ 728. **Mortgage as Security.**—This form of action would not apply under the statutes of California, and we here append the following notes and authorities as to the practice in this state. It will be seen by the current of authorities that the action must be upon the original indebtedness, and that the mortgage is considered as a mere security.[3] A mortgage is therefore a mere security for the debt, and does not pass the fee, nor give right to entry.[4] A mortgage in California, then, does not confer a right to the possession of real property, except as a result of foreclosure and sale.[5] And the vendee of the mortgagor can not be ousted by a purchaser under the decree of foreclosure and sale, unless such vendee was made a party to the foreclosure suit.[9] It shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale,[7] thus restricting the mortgage to the mere purposes of security.[8] The words "whatever its terms," do not relate to stipulations for possession or sale.[9] A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction, and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note or interest, as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, etc., is not a mortgage requiring judicial foreclosure and sale.[10]

[1] Leviston v. Swan, 33 Cal. 480.
[2] Godfrey v. Caldwell, 3 Cal. 101.
[3] McMillan v. Richards, 9 Cal. 365.
[4] Id.; Haffley v. Maier, 13 Cal. 13; Fogarty v. Sawyer, 17 Id. 589.
[5] Kidd v. Teeple, 22 Cal. 255.
[6] Haffley v. Maier, 13 Cal. 13.
[7] Cal. Pr. Act, sec. 260; Code C. P. sec. 744.
[8] McMillan v. Richards, 9 Cal. 365; Grattan v. Wiggins, 23 Id. 16; Dutton, v. Warschauer, 21 Id. 609; Skinner v. Buck, 29 Id. 253.
[9] Fogarty v. Sawyer, 17 Cal. 589.
[10] Koch v. Briggs, 14 Cal. 256.

§ 729. **Necessary Averment.**—Where the plaintiffs held certain security on real estate for the payment of an indebtedness of M. to them, but gave up and canceled such security upon B. executing a bond in their favor, the condition of which was that B. should pay to the plaintiffs such amount, not exceeding four thousand dollars, as should be found due to them from M. after sale of certain goods, and the winding up of the accounts of M. with the plaintiffs, the payment of which bond was guaranteed by the defendant under the same conditions expressed therein, it was held, in an action on the defendant's guaranty, that the want of an averment in the complaint of the winding up of the accounts of the plaintiffs with M., or any averment equivalent thereto, rendered the complaint substantially defective, and judgment was given for the defendant on demurrer to the complaint.[1]

§ 730. **Parol Evidence.**—Parol evidence of previous agreement to give a guaranty, or of knowledge of the relations between the principal parties, is inadmissible to make that a continuing guaranty which is not so upon its face.[2] So to charge one as guarantor who is not embraced in the writing.[3]

§ 731. On a Guaranty of a Precedent Debt.

Form No. 172.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., one A. B. was indebted to this plaintiff in the sun of ..... dollars.

II. That on the ..... day of ....., 18..., at ....., the defendant made and subscribed a memorandum in writing, of which the following is a copy [copy of the guaranty], and delivered the same to the plaintiff, whereby he promised to the plaintiff to answer to him for said debt.

III. That the plaintiff duly performed all the conditions thereof on his part.

IV. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.

§ 732. Against Sureties for Payment of Rent.

Form No. 173.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at....., one W. B. hired from the plaintiff for the term of.....years

[1] Mickle v. Sanchez, 1 Cal. 200.
[2] Boston etc. Glass Co. v. Moore, 88 Mich. 620.
[3] First National Bank v. Bennett, 119 Mass. 435.

the [house No..... street, city of....., at the annual rent of ..... dollars, payable monthly].

II. That [at the same time and place] the defendant agreed, in consideration of the letting of the said premises to the said W. B., to guarantee the payment of the said rent.

III. That the rent aforesaid for the month ending on the ..... day of ....., 18..., amounting to .. .. dollars, has not been paid.

[If by the terms of the agreement notice is required to be given to the surety, add:] IV. That on the ..... day of ....., 18 ..., the plaintiff gave notice to the defendant of the non-payment of the said rent, and demanded payment thereof.

V. That he has not paid the same.[1]

[Demand of Judgment.]

§ 733. **Guaranty to be in Writing in California.**—The following provisions of the civil code of California cover so many disputed questions, that it is thought best to insert them here. The code provides:

Sec. 2793. Except as prescribed by the next section, a guaranty must be in writing, and signed by the guarantor; but the writing need not express a consideration.

Sec. 2794. A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: 1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation in whole or in part, in consideration of such promise; 2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made his surety; 3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it release the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the

[1] The second count is a sufficient statement of consideration: Caballero v. Slater, 14 C. B. 303.

promisor, whether moving from either party to the antecedent obligation, or from another person; 4. Where a factor undertakes, for a commission, to sell merchandise, and guarantee the sale; 5. Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

§ 734. **Leases.**—At the time of the execution of a lease from A. to B., C. wrote underneath it: "I hereby agree to pay the rent stipulated above when it shall become due, provided the said B. does not pay the same"—this must be considered as a part of the lease itself, and not within the statute of frauds.[1]

CHAPTER VI.

INSURANCE.

§ 735. On Fire Policy—By the Insured.

Form No. 174.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendants are a corporation duly created by and under the laws of this state [or the state of, etc.], organized pursuant to an act of the legislature [of said state] entitled [title of the act], passed [date of passage], and the acts amending the same.

II. That the plaintiff [was the owner of, or] had an interest in a [dwelling-house, known as No. 200..... street, in the city of .....], at the time of its insurance and destruction [or injury] by fire as hereinafter mentioned.

III. That on the ..... day of ....., 18..., at ....., in consideration of the payment by the plaintiff to the defendants of the premium of ..... dollars, the defendants, by their agents duly authorized thereto, made their policy of insurance in writing, a copy of which is annexed hereto, and made part of this complaint.

IV. That on the ..... day of....., 18...., said dwelling-house and furniture were totally destroyed [or greatly damaged, and in part destroyed] by fire.

V. That the plaintiff's loss thereby was ..... dollars.

[1] Evoy v. Tewksbury, 5 Cal. 285.

VI. That on the ..... day of ....., 18...., he furnished the defendant with proof of his said loss and interest, and otherwise performed all the conditions of said policy on his part.

VII. That the defendant has not paid the said loss, nor any part thereof.

[Demand of Judgment.]

[Annex a copy of policy.]

§ 736. The Same, where Plaintiff Purchased the Property after Insurance.

Form No. 175.

[Title.]

I. [Allege incorporation as in last form.]

II That [name of original insured] was the owner of, or had an interest in, etc., etc.

III. [The same as in last form, substituting the names of the original insured, instead of the words "the plaintiff."]

IV. That on the ..... day of ....., 18..., at ....., with the consent of the defendants, in writing, on said policy, by their said agents, the said [original insured] sold, assigned, and conveyed to the plaintiff, his interest in the said [property] and in the said policy of insurance. [Continue as in last form.][1]

[Demand of Judgment.]

§ 737. The Same—Another Form.

Form No. 176.

[Title.]

The plaintiff complains, and alleges:

I. That he was the owner of a [match factory, and the machinery therein], in the town of ....., county of ....., at the time of its insurance and destruction by fire, as hereinafter mentioned.

II. That on the ..... day of....., 18..., at ....., in consideration of the sum of ..... dollars to them paid, the defendants executed to the plaintiff a policy of insurance on the said property, a copy of which is hereto annexed [marked "Exhibit A"], and made part of this complaint.

III. That on the ..... day of ....., 18...., the said property was totally destroyed by fire.

IV. That the plaintiff's loss thereby amounted to more upon each part of the property separately insured, than the amount of such separate insurance.

V. That on the ..... day of ....., 18..., he furnished the defendant with proof of his said loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

[1] As to the form of averment of an assignee's interest in the subject insured, see Granger v. Howard Ins. Co., 5 Wend. 200.

VI. That the defendant has not paid the said loss, nor any part thereof.

[DEMAND OF JUDGMENT.
[Annex "Exhibit A."]

§ 738. **The Same—Loss Payable to Mortgagee.**

Form No. 177.

[TITLE.]

[Allege as in form No. 174, substituting the original insured's name for the word "plaintiff," down to V.]

V. That on the ..... day of ....., 18 ..., the said insured made, executed, and delivered to plaintiff his mortgage on said premises, to secure the sum of ..... dollars, and assigned said policy to plaintiff, as further security, and thereupon defendant, at the request of plaintiff and of the insured, indorsed on said policy, "loss, if any, payable to [plaintiff]."

VI. That said mortgage and the debt secured thereby is wholly unpaid and unsatisfied.

[Continue as in preceding form.]

[DEMAND OF JUDGMENT.]

§ 739. **Insurable Interest—Averment of.**—A legal or equitable title is not necessary to give an insurable interest in property. If one has a right which may be forced against the property, and which is so connected with it that injury thereto will necessarily result in loss to him, he has an insurable interest.[1] The interest of the insured is one of the facts constituting the cause of action, and must be alleged.[2] Alleging that the defendants, in consideration, etc., insured him against loss, etc., on his three-story and attic stone building, and a frame one-story building attached, occupied by the said insured, is a sufficient averment of interest, at least on demurrer. If the averment is too general, the defendant's remedy is by motion.[3] Such interest must be alleged not only as to the time the policy was taken out, but also as to the time of loss.[4] An allegation, however, that at the time of insurance, he, the plaintiff, had a chattel mortgage on the property, has been held sufficient, as the interest will be presumed to continue.[5] An allegation, also, that the insurance was effected by plaintiff on "his" building is sufficient without setting out his title.[6] And

[1] Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47; see also Cal. Civil Code, secs. 2546, 2558.

[2] 2 Greenl. on Ev., secs. 376, 378-381.

[3] Fowler v. N. Y. Indemnity Insurance Co., 28 Barb. 143.

[4] Quarrier v. Peabody Ins. Co., 10 W. Va. 507.

[5] Roussel v. St. Nicholas Ins. Co., 41 N. Y. Sup. Ct. 279.

[6] Fowler v. N. Y. Ind. Ins. Co., 28 Barb. 143.

so of an allegation that the defendant "insured plaintiff" on a certain amount of grain.[1]

§ 740. **Other Essential Averments—Loss—Policy—Action by Mortgagor.**—In an action to recover on an insurance policy, it is essential to aver the loss, and to show that it occurred by reason of a peril insured against. It is not necessary to show that the loss did not occur through a peril excepted from the policy. Thus it is not necessary to state that the loss was not caused by invasion, riot, lightning, etc. That is a matter of defense which need not be anticipated.[2] A partial loss is recoverable under an allegation of total loss.[3] An insurance policy being a contract of the insurer's dictation, must be construed most strongly against them.[4] Policies of insurance are written contracts, to be interpreted by the same rules which apply to other contracts, and to be enforced according to the intention of the parties, and are to be construed liberally in favor of the assured.[5] In pleading the policy, formerly it was customary to set out the policy and conditions annexed at length. The more convenient way is to annex a copy to the complaint, and refer to it.[6] The payment of the premium is a condition precedent to the right to recover for the loss, and must be alleged.[7] The acknowledgment of the receipt of the premium in the policy may be contradicted.[8] In an action by the mortgagor on a policy issued to him, but on terms payable to the mortgagee, the complaint must aver "that the mortgage has been paid," or must join the mortgagee as a party.[9] Where a policy contained a provision that "if the property" insured "shall be sold," a delivery of the said property to a mortgagee, with the assent of the insurers, does not avoid the policy.[10]

§ 741. **Agent.**—An agent, to effect an insurance, who retains the policy, has the authority to collect it in case of loss,

[1] Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520.

[2] Lounsbury v. Pro. Ins. Co., 8 Conn. 466; Rucker v. Green, 15 East. 290; Hunt v. Huds. Riv. Ins. Co., 2 Duer, 487; Catlin v. Springfield Fire Ins. Co., 1 Sumn. 439; Ferrer v. Home Ins. Co., 47 Cal. 416; Forbes v. Am. etc. Ins. Co., 15 Gray, 249.

[3] Peoria Mar. & F. Ins. Co. v. Whitehill, 25 Ill. 466.

[4] Bevan v. Peabody Ins. Co., 8 W. Va 605.

[5] Wells, Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397; Foot v. Ætna Life Ins. Co., 61 N. Y. 571.

[6] Fairbanks v. Bloomfield, 2 Duer, 349.

[7] Bergson v. Builders' Ins. Co., 38 Cal. 541.

[8] Id.; *per contra*, see Teutonia Life Ins. Co. v. Anderson, 77 Ill. 384; Same v. Mueller, Id. 22.

[9] Ennis v. Harmony Fire Ins. Co., 3 Bosw. 516.

[10] Washington Ins. Co. v. Hayes, 17 Ohio St. 432. When a policy is avoided as to removed goods, see Id.

and the presumption is that he did retain it, especially as he proceeded to collect the money.[1]

§ 742. **Double Insurance.**—A policy forfeitable if the assured shall make any other insurance upon the property, is not forfeited by his taking a second but invalid policy thereon.[2]

§ 743. **Exceptions in Policy.**—A provision in a policy of fire insurance exonerating the company from loss by fire which should happen by explosion, must be taken to include an explosion of a steam-engine, insured by the policy, as well as any external explosion.[3]

§ 744. **Parol Policy.**—In the absence of a statutory prohibition, a policy of insurance may be made or changed by parol, and the fact that a policy is written does not prevent its change or enlargement or continuance by subsequent parol agreement.[4]

§ 745. **Representations.**—A representation is a statement in regard to a material fact made by the applicant for insurance to the insurer, with reference to a proposed contract of insurance. They are not part of the contract, but merely collateral to it. It is sufficient if representations are substantially true, while warranties must be strictly complied with.[5]

§ 746. **Re-insurance.**—There is no privity between the one originally insured and the re-insurer, and the liability over of the re-insurer is solely to the re-insured.[6] But where judgment is rendered against the original insurer, and he has contested the suit with the advice or acquiescence and for the benefit of the re-insured, the latter will be bound by the judgment, and for the costs and expenses incurred in the defense.[7]

§ 747. **Warranties, Misrepresentation, Concealment, etc.**—Under the provisions of the Georgia code, application for insurance must not only be made in the utmost good faith, but the representations contained therein are covenanted to be true. Not that they are warranties so as to vacate the policy, if any of them, whether material or not, are not true; but any variation in them from what is true, whereby the nature or extent or character of the risk is changed, will, if the policy makes them the basis of the contract of assurance, avoid the policy, whether

[1] De Ro v. Cordes, 4 Cal. 117.

[2] Thomas v. Builders' Mutual Fire Ins. Co., 119 Mass. 121; see Cal. Civil Code, secs. 2641, 2642.

[3] Hayward v. Liverpool and L. Fire and Life I. Co., 5 Abb. Pr. (N. S.) 142; Breuner v. Insurance Co., 51 Cal. 101.

[4] Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

[5] Buford v. N. Y. Life Ins. Co., 5 Or. 334; Higbee v. Guardian etc. Ins. Co., 66 Barb. 462.

[6] Strong v. Phœnix Ins. Co., 62 Mo. 289.

[7] Strong v. Phœnix Ins. Co., 62 Mo. 289; see Cal. Civil Code, secs. 2646–2649.

they are or are not willfully and fraudulently made.[1] But a provision in a policy of insurance, that the application for insurance shall be considered as a warrant, and that if the property insured is overvalued in it, the policy shall be void, applies only where the statement as to value is intentionally false. So also where the policy provides that all fraud, or attempt at fraud, by false swearing as to loss, shall cause a forfeiture of all claim under the policy, a wrongful or intentional false swearing is intended, and not a mere discrepancy or innocent error. And whether fraud is to be inferred from an excessive statement of the value of the property in the original application, or of the loss in the preliminary proofs, is a question of fact; and in neither case does a legal presumption of fraud arise, nor is the burden cast upon the assured to establish that his statement was not intentionally false.[2]

§ 748. **Wagering Policies.**—Policies executed by way of gaming or wagering, or where the policy stipulates for the payment of the loss whether the insured has any interest or not, or that the policy shall be received as proof of such interest, are void.[3] Insurance of lottery, or lottery prize, is unauthorized.[4]

§ 749. Allegation of Renewal.

Form No. 178.

That on the ..... day of ....., 18..., at ....., the defendants, by their agents duly authorized thereto, in consideration of ..... dollars to them paid by the plaintiff, executed and delivered to this plaintiff their certificate of renewal of said policy, of which the following is a copy annexed, as a part of this complaint.

§ 750. By Insured, on Agreement to Insure, Policy not Delivered.

Form No. 179.

[TITLE.]

The plaintiff complains, and alleges:

I. [Incorporation of defendants, as in Form No. 174.]

II. That on and before the ..... day of ....., 18..., the plaintiff applied to A. B., who was then and there the duly authorized agent for the defendants, for insurance against loss or damage by fire upon a certain stock of merchandise, the property of said plaintiff, consisting of [describe it], contained in a building occupied by the plaintiff for [state what], in said

[1] Southern Life Ins Co. v. Wilkinson. 53 Ga. 535; see also Cal. Civil Code, sec. 2561 et seq.; also sec. 2603 et seq.; Highbee v. Guardian etc. Ins. Co., 66 Barb. 462.

[2] Helbing v. Svea Ins. Co., 54 Cal. 156.

[3] Cal. Civil Code, sec. 2558.

[4] Cal. Civil Code, sec. 2532.

town of ..... And the defendants, by their said agent, then and there agreed to become an insurer to the plaintiff on the said stock for three months from that day, for ..... dollars. at a premium of ....., and that the said defendants would execute and deliver to the plaintiff a policy of insurance in the usual form of policies issued by them, for the sum of ... . dollars, for the term of three months from the said day.

III. That the plaintiff then and there paid to the defendant said premium, to wit, ... dollars.

IV. That it was then and there agreed between the plaintiff and the defendants, that the said insurance should be binding on them for the term of three months from the time of the receipt of the said premium, for the sum of ..... dollars; and the said defendants then and there, in consideration of the premises, agreed with the plaintiff, to execute and deliver to him, in a reasonable and convenient time, a policy, in the usual form of policies issued by said company, insuring the said stock of goods in the sum of ..... dollars against loss and damage by fire, the insurance to commence at the time of the receipt of the said premium, and to continue for the said term of three months.

V. That the defendants, by a policy of insurance issued in their usual form, among other things did promise and agree [here set out the legal effect of the contemplated policy].

VI. That after the insurance so made, and after the said promise to execute and deliver a policy in conformity thereto, and within the said term of three months, for which the said plaintiff was so insured, to wit, on the ..... day of ....., 18..., the said stock of merchandise in the said building mentioned and intended to be so insured, was totally destroyed by fire.

VII. That the plaintiff duly fulfilled all the conditions of said agreement and insurance on his part, and that more than ..... days [or otherwise, as required by the policy] before the commencement of this action, to wit, on the ..... day of ....., 18..., at ....., he gave to the defendants due notice and proof of the loss as aforesaid, and demanded payment of the said sum of ..... dollars.

VIII. That the defendant has not paid the same, nor any part thereof.

[Demand of Judgment.][1]

[1] Of the proper form of action to recover on an executory agreement to issue an insurance policy, see Post v. Ætna Ins. Co., 43 Barb. 351. For a form of complaint, see Rockwell v. Hartford Fire Ins. Co., 4 Abb. Pr. 179.

§ 751. **Action by Assignee.** — In an action on a policy of fire insurance, the interest of the assignee must be stated in the complaint, to make out a cause of action.[1] Where a complaint by the assignee of a fire policy averred an assurance of assignor on his building, that the policy was duly assigned with the consent of the insurers, that the plaintiff, at the time of the loss, was the lawful owner of the policy and of the claim against the insurers by reason of the policy and loss, and he made a demand of payment accompanied with the written assent of the person to whom the original assured had, after the loss, assigned all his property, it was held bad on general demurrer, as not showing any interest of the plaintiff or his assignor in the subject insured.[2] The assignee of a policy of insurance takes it subject to all equities.[3] An assignment of a policy of insurance upon a stock of goods, effected in the name of the assignor, made as collateral security for a debt, with an agreement that in case of loss by fire, the assignee shall collect the money and pay the debt, attaches in equity as a lien upon the amount due on the policy to the extent of the debt, as soon as the loss occurs.[4]

§ 752. **Notice of Loss.** — If the notice alleged states the twenty-fourth of May, the plaintiffs were not precluded from showing on the trial that the proper notice was given on the morning of the twenty-first.[5]

§ 753. **By Executor on Life Policy.**

Form No. 180.

[Title.]

The plaintiff complains, and alleges:

I. [Allege incorporation as in form No. 174.]

II. That on the ..... day of ....., 18.., at ....., the defendant, in consideration of the [annual, semi-annual, or otherwise] payment by one A. B. to it, of ..... dollars, made their policy of insurance in writing, of which a copy is hereto annexed, marked "Exhibit A," and made part of this complaint, and thereby insured the life of said A. B. in the sum of ..... dollars.

III. That on the ..... day of ....., 18.., at ....., the said A. B. died.

[1] Granger v. Howard F. Ins. Co., 5 Wend. 202.

[2] Fowler v. N. Y. Indem. Ins. Co., 22 N. Y. 422.

[3] Winslow v. Nason, 113 Mass. 414.

[4] Bibend v. L. F. and L. Ins. Co., 30 Cal. 78.

[5] Hovey v. American Mutual Insurance Company, 2 Duer, 554. As to when the insurer is exonerated by failure to give notice of loss, preliminary proofs, etc., see California Civil Code, secs. 2633–2637.

IV. That on the ..... day of ....., 18..., at ....., said A. B. left a will, by which the plaintiff was appointed the sole executor thereof [or this plaintiff and C. D. were appointed executors thereof].

V. That on the ..... day of ....., 18..., said will was duly proved and admitted to probate in the probate court of the county of ....., and letters testamentary thereupon were thereafter issued and granted to the plaintiff, as sole executor [or otherwise], by the probate court of said county; and this plaintiff thereupon duly qualified as such executor, and entered upon the discharge of the duties of his said office.

VI. That on the ..... day of ....., 18..., the plaintiff furnished the defendant with proof of the death of the said A. B., and the said A. B. and the plaintiff each duly performed all the conditions of said insurance on their part.

VII. That the defendant has not paid the same, and the said sum is now due thereon from the defendants to the plaintiff, as such executor.

[Demand of Judgment.]

§ 754. **Application.**—A paper attached to the application, with the heading "Questions to be answered by the medical examiner for the company," is not to be deemed the application or a part of the application; and that statements made by the applicant to the medical examiner, in answer to the questions in that paper, were not warranties within the meaning of the policy.[1] Incorrect statements by the applicant for a policy of life insurance, in answer to a question by the examining physician, will not be deemed such a misrepresentation as to avoid the policy when it appears that the physician's report as to the applicant's condition, and not the statements of the applicant himself, was relied upon by the company.[2]

§ 755. **Conflict of Laws.**—Where a policy of life insurance was made by a New York company, with a condition that it should not become valid until countersigned by their agent at Chicago, and the premium paid, and the condition complied with in Chicago, it was held that the law of Illinois as to assignment of the policy prevailed, and that such an assignment by a married woman by way of pledge was good in equity.[3]

§ 756. **Construction of Instruments and Statutes.**—A policy of insurance on the life of a husband was made payable

[1] Higbee v. Guardian etc. Ins. Co., 66 Barb. 462.

[2] Id. As to when the application will be held to be a part of the policy, and what constitutes a warranty, see same case.

[3] Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398.

to the wife, her executors, administrators or assigns, for her sole use, and in case of her death before his, to be paid to her children. A statute authorized a husband to effect such an insurance, and protected it from his creditors. The wife assigned the policy for value, and died before her husband. In an action thereon, it was held that the policy was payable to the children, not to the assignee, in the event which had happened.[1]

§ 757. **Suicide.**—Life insurance policies of the present day generally contain a provision, that in case the insured should "die by his own hand or act, the policy shall be void." If death occurs in such a manner, it is held that this proviso would not prevent a recovery if the insured killed himself in a fit of insanity, which overpowered his consciousness, reason, and will; that it is incumbent upon the plaintiff to show that the insured was insane when the act of self-destruction was committed; proof merely that he was insane at times would not be sufficient; that insanity could not be inferred from the fact that the insured destroyed his own life.[2] In an action on a policy containing such a provision, papers offered for the purpose of showing compliance with the requirements of the policy as to preliminary proof of death are *prima facie* evidence against the insured of the facts recited therein, including the manner of the insured's death, even though such recital show a death by suicide.[3]

§ 758. **By a Wife, Partner, or Creditor of the Insured.**

Form No. 181.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the..... day of....., 18....., at....., the defendant, in consideration of the [annual, or otherwise] payment to it of .....dollars, executed to the plaintiff a policy of insurance on the life of [her husband] A. B., of which a copy is hereto annexed, and made a part of this complaint, and marked "Exhibit A."

II. That the plaintiff had a valuable interest in the life of the said A. B. at the time of his death, and at the time of effecting the said insurance [state nature of interest].

III. That on the .....day of.....18....., at....., the said A. B. died.

[1] Connecticut Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305.

[2] Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414; see Merritt v. Cotton States Life Ins. Co., 55 Ga. 103; Hathaway's Adm'r v. Nat. Life Ins. Co., 48 Vt. 335.

[3] Walther v. Mutual Ins. Co., 8 West Coast Rep. 368.

IV. That on the ..... day of ....., 18.., the plaintiff furnished the defendant with proof of the death of the said A. B., and otherwise performed all the conditions of the said policy on [her] part.

V. That the defendant has not paid the said sum, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex a copy of policy, marked "Exhibit A."]

§ 759. **By Assignee in Trust for Wife of Insured.**

Form No. 182.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation as in form No. 174.]

II. [Same as in form No. 180.]

III. That on the ..... day of ....., 18.., the said A. B. [with the written consent of the defendants, or otherwise, according to the terms of the policy], assigned said policy of insurance to this plaintiff, in trust for E. B., his wife.

IV. That up to the time of the death of A. B., all premiums accrued upon said policy were fully paid.

V. That on the ..... day of ....., 18.., at ....., said A. B. died.

VI. That said A. B. and the plaintiff each performed all the conditions of said insurance on their part, and the plaintiff, more than ..... days before the commencement of this action, to wit, on the ..... day of ...., 18.., at ....., gave to the defendants notice and proof of the death of said A. B. as aforesaid, and demanded payment of the said sum of ..... dollars.

VII. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 760. **Assigned.**—That a policy was duly assigned and transferred, indicates that the assignment was by a sealed instrument, and a consideration is inferred.[1] In California all written instruments import a consideration.[2]

§ 761. **Accidental Insurance—Insured against Insurer.**

Form No. 183.

[TITLE.]

The plaintiff complains, and alleges:

I. That defendant is a corporation, organized under the laws of the state of New York.

[1] Fowler v. N. Y. Indem. Ins. Co., 23 Barb. 143; Morange v. Mudge, 6 Abb. Pr. 243.

[2] Civil Code, sec. 1614.

II That on the ..... day of ....., 18 .., at the city of San Francisco, and state of California, in consideration of the payment by plaintiff to defendant of a premium of ..... dollars [gold coin], defendant made and delivered to plaintiff its policy of insurance, in writing, upon the life of ....., of the city and county of San Francisco, and state of California, a copy of which is annexed to this complaint and marked "Exhibit A," and is made part thereof; and thereby insured the life of said ....., in the sum of ..... dollars [gold coin], against loss of life by personal injury caused by accident, as stated in said policy, for the term of [six] months from and after the ..... day of ....., 18 ...

III. That afterwards, to wit, on the .... day of ....., 18.., for a valuable consideration, the defendant made and delivered to plaintiff its written consent that said ..... might pursue the vocation of supercargo on a sailing vessel during the continuance of the said policy of insurance, without prejudice to said policy, a copy of which consent is hereto annexed as a part of this complaint, and marked "Exhibit B."

IV. That between the ..... day of ....., 18.., and the ..... day of ....., 18..., and as plaintiff is informed and believes and avers, on or about ....., 18.., and while said insurance policy and said written consent were in force, said ..... received a personal injury which caused his death within three months thereafter, and that said injury was caused by an accident within the meaning of said policy and insurance, and the conditions and agreements therein contained, to wit, by the destruction and loss of a certain schooner called ....., while said ....., was on board of her as supercargo, and not otherwise, by a storm at sea, or other perils thereof, while she was on a trading voyage from the port of San Francisco, in said state, to the Aleutian Islands, in the North Pacific ocean, and back to said San Francisco, within the meaning of said policy and written consent, and between the said ..... day of ..... and said ..... day of .....

V. That plaintiff at the times of making and delivery of said policy and written consent, as aforesaid, was the wife of said ....., and as such had a valuable interest in his life.

VI. That said ..... and this plaintiff each fulfilled all the conditions and agreements of said policy of insurance on their part, and the plaintiff more than sixty days before the commencement of this action, to wit, on or about the ..... day of ....., gave to the defendants due notice and proof of the

death of said ....., as aforesaid, and demanded payment of the sum of ..... dollars [gold coin], but no part thereof has been paid.

VII. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of policy, marked "Exhibit A."]

§ 762. Marine Insurance—On an Open Policy.

Form No. 184.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation as in form No. 174.]

II. That the plaintiff was the owner of [or had an interest in] the ship [name of ship], at the time of its insurance and loss, as hereinafter mentioned.

III. That on the ..... day of ....., 18..., at....., the defendant, in consideration of ..... dollars to it paid [or which the plaintiff then promised to pay], executed to him a policy of insurance upon the said ship, a copy of which is hereto annexed and made part hereof [or whereby it promised to pay to the plaintiff, within ..... days after proof of loss and interest, all loss and damage accruing to him by reason of the destruction or injury of the said ship, during its next voyage from ..... to ....., whether by perils of the sea, or by fire, or by other cause therein mentioned, not exceeding ..... dollars].

IV. That the said vessel, while proceeding on the voyage mentioned in the said policy, was, on the ..... day of ....., 18..., totally lost by the perils of the sea [or otherwise].

V. The plaintiff's loss thereby was ..... dollars.

VI. That on the .... day of ....., 18..., he furnished the defendant with proof of his loss and interest, and otherwise performed all the conditions of the said policy on his part.

VII. That the defendant has not paid the said loss, nor any part thereof.

[DEMAND OF JUDGMENT.][1]

[Annex copy of policy.]

§ 763. **Abandonment.**—It is not necessary, in an action of covenant on a policy, that the declaration should aver that the plaintiff had abandoned to the underwriters.[2]

[1] For a sufficient form of complaint, consult Page v. Fry, 2 Bos. & Pul. 2 0; Crawford v. Hunter, 8 T R. 23.

[2] Hodgson v. Marine Ins. Co., 5 Cranch, 100; and see Columbian Ins Co. v. Catlett, 12 Wheat. 383; Snow v. Union Mut. etc. Ins. Co., 119 Mass. 592.

§ 764. **Insurance by Agent.**—Where the agent of an insurance company was fully authorized to make insurance of vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus: "The insurance on this application to take effect when approved by E. P. D., general agent." etc., does not make the previous transaction a nullity until approved.[1] And though the general agent sent back the application directing the agent who delivered the policy to return to insured his premium note and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor canceled the policy.[2]

§ 765. **Interest of Insured—Allegation of.**—The interest of the insured is one of the facts constituting the cause of action,[3] and the averment that he gave the defendant due proof of loss and of interest, can not be construed as an averment that the plaintiff had an insurable interest.[4] It is the safest practice to aver the interest, when it does not distinctly appear in the policy as set forth or annexed.[5] Interest may be more briefly alleged by inserting after the description of the object insured, "then and until the loss hereinafter mentioned, the property of this plaintiff." It need not be averred that the plaintiff was interested at the time of making the policy. In marine insurance an interest at the commencement of the risk is sufficient,[6] or that the plaintiff was interested in the vessel at the time of the loss, to the extent of the policy.[7] The nature or extent of the trust upon which the interest was held need not be set forth, they being matters of evidence.[8] Where the property is admitted to have been owned by the plaintiff when the policy was issued, the burden of proof is upon the defendants to show a subsequent alienation of the property.[9]

[1] Ins. Co. v. Webster, 6 Wall. U. S. 129.
[2] Id.; Amer. Law Reg., July, 1868.
[3] 2 Greenl. Ev., secs. 376, 378–381.
[4] Williams v. Ins. Co. of North America, 9 How. Pr. 365.
[5] Phil. on Ins. 612; Ellis on Fire Ins. 175.
[6] 2 Greenl. on Ev. 381; 2 Phil. on Ins. 614.
[7] Henshaw v. Mut. Safety Ins. Co., 2 Blatchf. 99.
[8] Id.
[9] Orrell v. Hampden Ins. Co., 13 Gray, 431.

§ 766. **Mutuality of Agreement.**—In an action on an open policy, providing that the company shall be liable for such sums as shall be specified by application, and mutually agreed upon and indorsed upon the policy, it is necessary to aver that an amount sought to be recovered had been mutually agreed upon and indorsed upon the policy.[1]

§ 767. **Nature of the Loss.**—The complaint must show a loss of a nature intended to be covered by the insurance;[2] but not to negative possible defenses. And the loss of a vessel insured should be deemed effectual and certain, from the time the vessel was so injured that her destruction became inevitable, and the claim for damages must be deemed to have then attached although she was kept afloat some time after such injury.[3]

§ 768. **Parties.**—Those who had an interest in the vessel insured, at the time of the fatal injury, may recover upon the policy, notwithstanding the fact of their having subsequently, and before the sinking of the vessel, made an assignment of their interest to others, who are not parties to the action.[4] Where the policy is on account of whom it may concern, the person to whom it is issued may sue, on behalf of all the owners, in his own name, as a trustee of an express trust.[5] If such person die, his personal representative may sue.[6] Where several insurance companies join in one policy, in which the several liability of each is set forth, they may be joined as defendants in an action to recover the loss.[7]

§ 769. **Foreign Insurance Company's Compliance with Statutes.**—In an action against a foreign insurance company it is not necessary to allege or show that the laws of the state in which the contract was made, authorizing the company to do business therein, had been complied with.[8] But in an action by such company such compliance must be shown.[9]

[1] Crane v. Evansville Ins. Co., 13 Ind. 446.

[2] Ellis on Fire Ins. 176; Phil. on Ins. 618.

[3] Duncan v. Great Western Ins. Co., 5 Abb. Pr., N. S., 173; Pardo v. Osgood, 5 Rob. 348; reversing S. C., 2 Abb Pr., N. S., 365.

[4] Duncan v. Great Western Ins. Co., 5 Abb. Pr., N. S., 173.

[5] Illinois Fire Ins. Co. v. Stanton, 57 Ill. 354; Walsh v. Washington Mar. Ins. Co., 32 N.Y. 427; Pitney v. Glen's Falls Ins. Co., 65 Id. 6; Sturm v. Atlantic Mut. Ins. Co., 63 Id. 77; Protection Ins. Co. v. Wilson, 6 Ohio St. 554; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527; Waring v. Indemnity Ins. Co., 45 N. Y., 606; Strohn v. Hartford Ins. Co., 33 Wis. 648; Fleming v. Ins. Co., 12 Pa. St. 391; Williams v. Ocean Ins. Co., 2 Met. 303; Knight v. Eureka etc. Ins. Co., 26 Ohio St. 664.

[6] Sleeper v. Union Ins. Co., 65 Me. 385.

[7] Bernero v. Ins. Cos., 8 West Coast Rep. 292; Ins. Co. v. Boykin, 12 Wall. 433.

[8] Germania F. Insurance Co. v. Curran, 8 Kan. 9; Weber v. Union M. L. Ins. Co., 5 Mo. App. 51; Fitzsimmons v. City F. Ins. Co., 18 Wis. 234.

[9] Jones v. Smith, 3 Gray, 500; Washington Co. M. Ins. Co. v. Hast-

§ 770. **Attaching Policy and Application.**—Where, by the express terms of the policy, the proposals, answers, and declarations made by the applicant are made a part of the policy, they should be stated in the complaint in an action founded on the policy.[1] But such application need not be attached when not made a condition of the policy.[2]

§ 771. **Premium, how Alleged.**—The complaint must aver payment, or a liability to pay the premium.[3]

§ 772. **Risks.**—Capture, though not enumerated, is one of the risks where the enumeration of risks was in the English form, and upon a loss the company was liable.[4]

§ 773. **On Cargo Lost by Fire—Valued Policy.**

Form No. 185.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation, as in form No. 174.]

II. The plaintiff was the owner of [or had an interest in] [two hundred barrels of flour], shipped on board the vessel called the A. D., from ..... to ....., at the time of the insurance and loss hereinafter mentioned.

III. That on the ..... day of ....., at ....., the defendant, in consideration of ..... dollars which the plaintiff then paid, executed to him a policy of insurance upon the said goods, a copy of which is hereto annexed, marked "Exhibit A," and made part of this complaint [or whereby it promises to pay to the plaintiff ..... dollars in case of the total loss, by fire or other causes mentioned, of the said goods, before their landing at ..... or, in case of partial damage, such loss as the plaintiff might sustain thereby, provided the same should not exceed ..... per centum of the whole value of the goods].

IV. That on the ..... day of ....., 18... at ....., while proceeding on the voyage mentioned in the said policy, the said goods were totally destroyed by fire.

V. That the plaintiff's loss thereby was ..... dollars.

ings, 2 Allen, 398; Washington M. Ins. Co. v. Chamberlain, 16 Gray, 165.

[1] Bidwell v. Connecticut M. L. Ins. Co., 3 Sawyer, 261; Byers v. Farmers' Ins. Co., 35 Ohio St. 606; Bobbint v. L. & L. & G. Ins. Co., 66 N. C. 70.

[2] Union Ins. Co. v. McGookey, 33 Ohio St. 555; Mutual Ben. Ins. Co. v. Cannon, 48 Ind. 264; Jacobs v. Nat. L. Ins. Co., 1 McArthur, 632; Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35.

[3] 2 Greenl. Ev., secs. 376–381; Phil. on Ins. 611.

[4] The Merchants' Ins. Co. v. Edmond etc., 17 Gratt. (Va.) 138. As to the terms of an insurance policy, whether it be by a marine or fire insurance, see Eureka Ins. Co. v. Robinson, 56 Pa. St. 256; American H. Ins. Co. v. Patterson, 28 Ind. 17.

VI. That on the ..... day of ....., 18..., he furnished the defendant with proof of his loss and interest, and otherwise performed all the conditions of the said policy on his part.

VII. That the defendant has not paid the said loss, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of policy, marked "Exhibit A."][1]

§ 774. **Interest, how Alleged.**—In a declaration upon a policy of insurance on the cargo of a canal boat, it was held a sufficient averment of the plaintiff's interest to allege that the insurance was "for the account and benefit of the plaintiff as a common carrier, for hire," etc.; and a sufficient averment of the liability incurred, to state that an amount of goods exceeding that mentioned in the policy was intrusted to him as a carrier, and that they were consumed by fire, and the plaintiff thereby became liable to pay to the respective owners a greater sum than that insured. It is not necessary to aver actual payment.[2] If the insurance was upon the goods to be laden, state that they were laden, and their loss.[3]

§ 775. **Valued Policy—Allegation of.**

Form No. 186.

That on, etc., at, etc., in consideration of the premium of ..... dollars, then and there paid to them by the plaintiff, the defendants, by their agents duly authorized thereto, made their policy of insurance in writing, of which a copy is annexed, marked "Exhibit A," and thereby insured for him ..... dollars upon the ship ....., then lying in the harbor of ....., for a voyage from ..... to ....., against the perils of the seas, and other perils in the policy mentioned.

§ 776. **On Freight—Valued Policy.**

Form No. 187.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation as in form No. 174.]

II. That he had an interest in the freight to be earned by the ship [Flying Mist], on her voyage from .... to ....., at the time of the insurance and loss hereinafter mentioned, and that a large quantity of goods was shipped upon freight in her at that time.

III. That on the ..... day of ....., 18..., at .....,

[1] As to manner of pleading a want of seaworthiness to an action on a time policy, see Jones v. The Insurance Co., 2 Wall Jr. C. Ct. 278.

[2] Van Natta v. Mutual Security Ins. Co., 2 Sandf. 490; and see De Forest v. Fulton Fire Ins. Co., 1 Hall, 94.

[3] Marsh on Ins. (3d ed.) 244–5, 278, 724.

the defendant, in consideration of ..... dollars to it paid, executed to the plaintiff a policy of insurance upon the said freight, a copy of which is hereto annexed, marked "Exhibit A," and made part of this complaint, and thereby insured for him ..... dollars upon certain goods then laden upon the ship, for a voyage from .... to ....., against the perils of the sea, and other perils in the policy mentioned.

IV. That the said vessel, while proceeding upon the voyage mentioned in the said policy [or during said voyage, and while lying in the port of .....], was [or state said goods, the freight whereof was insured, were], on the ..... day of ....., 18 ..., totally lost by [the perils of the sea].

V. That the plaintiff has not received any freight from the said vessel, nor did she earn any on the said voyage, by reason of her loss as aforesaid.

VI. That the plaintiff's loss thereby was ..... dollars.

VII. That on the ..... day of ....., 18 ..., he furnished the defendant with proof of his loss and interest, and otherwise performed all the conditions of the said policy on his part.

VIII. That the defendant had not paid the said loss.

[DEMAND OF JUDGMENT.]

[Annex copy of policy, marked "Exhibit A."]

§ 777. Averment of Loss by Collision.

Form No. 188.

That on the ..... day of ....., 18 ..., while the said [ship], with the said goods on board, was proceeding on her said voyage, and before her arrival at her said port of destination in the said policy mentioned, another vessel, with great force and violence, was carried against and run foul of the said [ship] and the said [ship] thereby was, with the said goods, sunk and [totally] lost.

§ 778. Averment of Waiver of a Condition.

Form No. 189.

That afterwards, and on the ..... day of ....., 18 ..., at ....., the defendants, by their agents duly authorized thereto waived the condition of the said policy by which [designating it], and released and discharged the plaintiffs from the performance thereof [or, and consented that the plaintiffs should, etc., according to the facts].

§ 779. For a Partial Loss and Contribution.

Form No. 190.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation as in form No. 174.]

II. That on the ..... day of ....., ..., 18..., at ....., in consideration of the premium of ..... dollars, then and there paid by the plaintiff to the defendants, the defendants by their agents duly authorized thereto, made their policy of insurance in writing, of which a copy is annexed as a part of this complaint, and marked "Exhibit A," and thereby insured for him ..... dollars upon certain goods then and there laden upon the ship ....., for a voyage from .. .. to ....., against the perils of the sea [or mention the perils which occasioned the loss].

III. That said ship did, on the ..... day of ....., sail on the said voyage, and while they proceeded thereon was, by the perils of the seas, dismasted, and otherwise damaged in her hull, rigging, and appurtenances; insomuch that it was necessary for the preservation of said ship and her cargo, to throw over a part of said cargo [or a part of her rigging and furniture], and the same was accordingly thrown over for that purpose.

IV. That in consequence thereof, the plaintiff was obliged to expend ..... dollars in repairing said ship, at ....., and is also liable to pay ..... dollars as a contribution to and for the loss occasioned by said throwing over of part of said cargo.

V. That on the ..... day of ....., 18..., at ....., he gave to the defendant due notice and proof of the loss as aforesaid, and otherwise duly fulfilled all the conditions of said policy of insurance on his part.

VI. That no part of the same has been paid by the defendant.

[Demand of Judgment.]

Annex copy of policy, marked "Exhibit A."

§ 780. Allegation for a Particular Average Loss.

Form No. 191.

That on the ..... day of ....., while on the high seas, the sea-water broke into the said ship, and damaged the said [flour] to the amount of ..... dollars.

§ 781. **Contribution.**—The owner of a vessel is not entitled to contribution on general average, for damage sustained, or expense incurred, by reason of the perils of the seas, if the vessel was unseaworthy when she left port, although from a latent defect.[1]

§ 782. **Jettison.**—A vessel fell in with a ship, in a sinking condition. To save the lives of the ship's passengers and crew,

[1] Wilson v. Cross, 33 Cal. 60.

the master of the vessel consented to receive them; but as it was necessary to throw overboard part of his cargo to make room for them, he began to do so before any of them came on board, and continued it while they were coming on board, until room enough was made. The owner of the vessel sued the insurers for a contribution to general average, for the above jettison; it was held that he could not recover.[1]

§ 783. **Particular Average.**—Furniture was insured "free of particular average" (which was taken to mean "against total loss only"). During the voyage, the vessel was wrecked and condemned, and said goods were transhipped, parts of sets into one vessel, and parts into another. One of said vessels was lost, with its cargo, and the other arrived safely; it was held that the insurers were liable for the goods lost.[2]

CHAPTER VII.

ON JUDGMENTS.

§ 784. **General Form.**

Form No. 192.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., in the superior court of the county of ....., in this state, a judgment was duly given and made by said court in favor of this plaintiff, and against the defendant herein, in an action in said court last above-named pending, wherein this plaintiff was plaintiff, and said defendant was defendant, for the sum of ..... dollars [if the judgment provided for a special rate of interest, add], which said judgment bears interest from the date thereof at ..... per centum per annum.

II. That said judgment remains wholly unpaid.[3]

[DEMAND OF JUDGMENT.]

§ 785. **Action Lies on Judgment or Decree.**—Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the

[1] Dabney v. New England Mutual Ins. Co., 14 Allen (Mass.), 300.

[2] Pierce v. Columbia Ins. Co., 14 Allen (Mass.), 320.

[3] The above form of complaint is sufficient on a judgment of any domestic court, or on a judgment of a circuit court of the United States, for the jurisdiction of such courts is presumed: Bement v. Wisner, 1 Code R. (N. S.) 143; Griswold v. Sedgwick, 1 Wend. 126.

judgment may be maintained. It is in this way that judgments of foreign courts are enforced, and the rule applies equally whether they be courts of record or not.[1] The same rule prevails in the United States, where such action has been maintained in one state on a judgment rendered by a justice of the peace in another.[2] In Virginia, debt was maintained upon a judgment obtained in a court, the office of which had been consumed by fire, and the record of the judgment wholly destroyed.[3] An action lies upon an unpaid judgment, although the execution has not been returned.[4] It is not necessary to allege an unsuccessful effort to collect the judgment.[5] It was formerly doubted whether an action could be maintained upon a decree for the reason that the plaintiff had no legal right to the money, but only that upon certain views peculiar to a court of equity the payment ought to be made and that no promise could be implied from a decree.[6] It is now established, both in England and the United States, that an action will lie on such a decree.[7] Such action lies although the judgment could have an execution issued thereon.[8]

§ 786. **Against Counties.**—A judgment against a county under the act authorizing counties to sue and be sued, has the effect of converting a demand into an audited claim.[9] After such judgment has been obtained the proper mode of enforcing it is by a writ of mandate. An ordinary action on such judgment does not lie.[10]

§ 787. **Judgment, how Pleaded.**—In pleading a judgment or award, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.[11] This applies, however, to judgments of courts of general jurisdiction. In suing on a judgment of a foreign court of inferior jurisdiction, facts must

[1] Williams v. Jones, 13 M. & W. 628.
[2] Coe v. Driskell, 1 Blackf. 15.
[3] Newcomb v. Drummond, 4 Leigh, 57.
[4] Linton v. Hurley, 114 Mass. 76.
[5] King v. Blood, 41 Cal. 314.
[6] See Carpenter v. Thornton, 2 Barn. & Ald. 52.
[7] Henderson v. Henderson, 51 Eng. Com. L. 288; Pennington v. Gibson, 16 How. (U. S.) 76; Freeman on Judgment, secs. 432–441.
[8] Brooks v. Todd, 1 Handy, 169; Herdley v. Roby, 6 Ohio, 521; [illegible] v. Burns, 2 W. L. M. 387; Linton v. Hurley, 114 Mass. 76.
[9] Sharp v. Contra Costa Co., 34 Cal. 284.
[10] Alden v. County of Alameda, 43 Cal. 270.
[11] California Code C. P., sec. 456; N. Y. Code, sec. 532; Ohio Code, sec. 120; Wheeler v. Dakin, 12 How. Pr. 542. It is said, in great measure *obiter*, in Hollister v. Hollister, 10 Id. 532, that this section does not apply to foreign judgments, and that a general averment of jurisdiction would not be sufficient; but in Halstead v. Bates, 17 Abb. Pr. 227, the contrary is held.

be stated showing jurisdiction of the person and the subject-matter.[1] In Ohio it was held that this section was not intended to apply to the judgments of the superior courts of general jurisdiction of that State, or to the judgments of the courts of other States.[2] But section 120 of the Ohio code refers only to "pleading a judgment or other determination of a court or officer of special jurisdiction." In Indiana it is held that in a complaint on a judgment of a justice of the peace of another state, the averment that the judgment or decision was duly given or made is equivalent to an averment that the justice had jurisdiction of the person and subject-matter.[3]

§ 788. **The Same—Date of Entry.**—Where in an action on a judgment the *postea* in the record stated that the judge presiding at *nisi prius* sent up the record of proceedings had before him on the nineteenth day of November, 1855, and it appeared that judgment was signed September 26, 1856, it was held that it was properly averred in the complaint that the judgment was recovered on the latter day; and if this had been an error it was amendable at the trial, and would be disregarded on appeal.[4]

§ 789. **The Same—Appeal.**—A judgment unreversed and not suspended, may be enforced.[5] But it need not be averred in the complaint that it was unreversed.[6]

§ 790. **The Same—Pleading in Federal Courts.**—A declaration is sufficient which avers that "at a general term of the supreme court in equity, for the state of New York," etc.; being thus averred to be a court of general jurisdiction, no averment was necessary that the subject-matter in question was within its jurisdiction, and the courts of the United States will take notice of the judicial decisions in the several states, in the same manner as the courts of those states.[7] Indeed it has become a settled practice in declaring in an action upon a judgment, not as formerly, to set out in the declaration the whole record of the proceedings in the general suit; but only to allege, generally, that the plaintiff, by the consideration and judgment of the court, recovered the sum mentioned therein; the original cause of judgment having passed *in rem judicatam*.[8]

[1] McLaughlin v. Nichols, 13 Abb. Pr. 244.
[2] Memphis Medical College v. Newton, 2 Handy, 158.
[3] Crake v. Crake, 18 Ind. 156; Halstead v. Black, 17 Abb. Pr. 227.
[4] Lazier v. Westcott, 26 N. Y. 146.
[5] Raun v. Reynolds, 18 Cal. 276.
[6] 1 Ch. Pl. 321; Chaquette v. Ortet, 60 Cal. 594; Freem. on Judg., secs. 432-434.
[7] Pennington v. Gibson 16 How. (U. S.) 65.
[8] Biddle v. Wilkins, 1 Pet. 686.

§ 791. **Judgment by Confession.**—A judgment creditor, made such by confession of judgment, who seeks to reach money of the judgment debtor in the hands of junior judgment creditors, upon the ground that he has a prior lien on the same, must aver in his complaint that at the time his judgment was rendered, the amount for which it was rendered was unpaid and due.[1]

§ 792. **Defense of Dismissal.**—Where defendant relies in defense upon an agreement under which a former action for the same cause was dismissed, settled, or released, he must raise such defense by plea, otherwise it will not be available as a bar.[2] The plea of *nil debit* is an insufficient answer to an action on a judgment.[3]

§ 793. **Judgments of Justices' and Probate Courts.**—It is a general rule that the law presumes nothing in favor of the jurisdiction of a justice's court. Where such rule prevails, a complaint on a judgment of a justice must affirmatively show every fact conferring jurisdiction.[4] This was originally the rule in California, but it has since been changed by statute.[5] In pleading the judgment of a probate court, in California, it was formerly necessary to set forth the facts which give jurisdiction.[6] This, however, has been changed by the code, section 456, and judgments of that court are now pleaded as other judgments of courts of general jurisdiction.[7]

§ 794. **On a Judgment by Leave of Court.**

Form No. 193.

[TITLE.]

The plaintiff complains, and alleges:

I. That by leave of this court first had and obtained by order of this court, made at the general term held at ... ., and on ...., which order was made on due notice to the defendant, the said plaintiff brings this action.

II. [Allege recovery of judgment as in preceding form.]

[DEMAND OF JUDGMENT.]

§ 795. **Necessary Averment.**—In New York, in a complaint on a judgment rendered in any court of that state, it is necessary to aver that leave to prosecute the action has been obtained.[8] And if this averment is not made, it does not state

[1] Denver v. Burton, 28 Cal. 549.
[2] Haldeman v. United States, 91 U. S. (1 Otto) 584.
[3] Indianapolis, B. & W. Railway Co. v. Risley, 50 Ind. 60.
[4] Swain v. Chase, 12 Cal. 283; Rowley v. Howard, 23 Id. 401.
[5] Cal. Code of Civil Procedure, sec. 456.
[6] Smith v. Andrews, 6 Cal. 652; Townsend v. Gordon, 19 Id. 189.
[7] Beans v. Emanuelli, 36 Cal. 117.
[8] N. Y. Code, sec. 71.

a sufficient cause of action.[1] The practice in California is, however, different, as their suit may be commenced without leave of court previously obtained. Yet there are in our practice numerous instances where leave of court must be first obtained; such as suits against receivers, etc.

§ 796. **The Same, by an Assignee.**

Form No. 194.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., in the superior court, in and for the county of ....., in this state, a judgment was duly given and made by said court in favor of one C. D., and against E. F., the defendant herein, in an action in said court pending, wherein said C. D. was plaintiff, and the said E. F. was defendant, for the sum of ..... dollars.

II. That on the ..... day of ....., 18.., at ....., the said C. D. assigned said judgment to this plaintiff.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 797. **Demand.**—It is not necessary to aver any demand of payment by the assignee, or any refusal to pay by the debtor.[2]

§ 798. **On a Foreign Judgment of a Court of General Jurisdiction.**

Form No. 195.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the court of common pleas, in and for the county of ....., in the state of [Ohio], was a court of general jurisdiction, duly created and organized by the laws of said state.

II. That on the ..... day of ....., 18.., the plaintiff commenced an action in said court against the defendant by the issuance of summons [or other process, as the case may be], which summons was duly and personally served upon said defendant [or, in which action the defendant appeared in person, or by attorney]. That thereupon such proceedings were had therein in said court; that on the ... day of .....18.., a judgment for the sum of ..... dollars was duly given and made by said court in favor of the plaintiff, and against the defendant.

III. That no part thereof has been paid [except, etc.]

[DEMAND OF JUDGMENT.]

[1] Graham v. Scripture, 26 How. Pr. 501.
[2] Moss v. Shannon, 1 Hilt. 175.

§ 799. **Essential Allegations.**—In pleading the judgment of a sister state, it is sufficient to allege that it was duly recovered. Facts conferring jurisdiction need not be stated, overruling *dictum*.[1] It is necessary to allege jurisdiction only in the case of a court whose title indicates that it may be one of limited jurisdiction. In such a case, it is better to aver that the court had a general jurisdiction. This was held necessary in an action on the judgment of a county circuit court of another state.[2] In Foot v. Stevens, 17 Wend. 483, it is said that courts of common pleas, and county courts of other states, are to be presumed of general jurisdiction.[3]

§ 800. **Appearance, how Alleged.**—Alleging that defendant was duly notified, but not saying of what; or that he had personal notice of the commencement of the suit, without saying from whom, is bad.[4]

§ 801. **Appearance without Summons.**—In pleading the judgment of a court of general jurisdiction of another state, if the defendant therein was served or appeared, the facts upon which jurisdiction is founded need not be averred. Want of jurisdiction is matter of defense.[5]

§ 802. **Exemplification of Judgment.**—A certificate of exemplification of a judgment rendered in another state, attested by the clerk under the seal of the court, and when the presiding judge of the court certifies that the attestation is in due form of law, is sufficient to sustain an action in another state.[6] It is only necessary that the certificate should state the main facts which are made necessary by the act of congress respecting the authentication of judgments. It is not necessary to aver jurisdiction.[7] A certificate of the proceeding of the surrogate's court of New York, which states that A. W. B. is surrogate of the city and county of New York, and acting clerk of the surrogate court; that he has compared the transcript of the papers with the original records in the matter of the estate of W. Y., and finds the same to be correct, and a true copy of all the proceedings; and that the certificate is in due form of law; in testimony whereof he sets his hand and affixes his seal of office—is sufficient.[8]

[1] Hollister v. Hollister, 10 How. Pr. 532; Ayres v. Covill, 18 Barb. 260; Halstead v. Black, 17 Abb. Pr. 257.

[2] McLaughlin v. Nichols, 18 Abb. Pr. 244.

[3] Compare also Frees v. Ford, 6 N. Y. 176; Kundolf v. Thalheimer, 17 Barb 506.

[4] Long v. Long, 1 Hill, 597.

[5] Wheeler v. Raymond, 8 Cow. 311.

[6] Thompson v. Monrow, 1 Cal. 428.

[7] Low v. Burrows, 12 Cal. 181.

[8] Id.

§ 803. **Force and Effect of Foreign Judgment.**—The judgment in one state is to be received, and have full force, effect, and virtue, in another state.[1] An action on a judgment of a court of competent jurisdiction, in the state of New York, may be maintained in this state, notwithstanding an appeal from such judgment has been taken and is still pending in the court of appeals in that state.[2]

The provision of the United States constitution giving force and effect to the judgments of sister states has no reference to the manner of pleading, but only to their effect when offered in evidence.[3]

§ 804. **Allegation of Jurisdiction.**—In actions on judgments obtained in another state, where the transcript shows the jurisdiction of the court on its face, it is not necessary to aver jurisdiction.[4] In Indiana, the record of the judgment or a transcript of it must be set forth.[5] It should not be, in New York.[6] If the judgment was recovered in Ohio against the company by an erroneous name, but the suit upon the judgment was brought in Indiana against the company, using its chartered name correctly, accompanied with an averment that it was the same company, this mistake is no ground of error; it could only be taken advantage of by a plea in abatement in the suit in which the first judgment was recovered.[7] In Ohio it is held that a transcript of a record showing the recovery of a judgment is not "an instrument for the unconditional payment of money only," and can not be made a part of the complaint by reference.[8] In an action in Kansas upon a judgment recovered in the court of common pleas of Pennsylvania, the petition need not aver that that court had jurisdiction, either of the person or the cause of action.[9]

§ 805. **On a Foreign Judgment of an Inferior Tribunal.**

Form No. 196.

[Title.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, J. P. was a justice

[1] Miller v. Durvee, 7 Cranch, 481; Hampton v. McConnell, 3 Wheat. 234; Mayhew v. Thatcher, 6 Id. 129; Armstrong v. Carson's Ex'rs, 2 Dall. 302; Green v. Sarmiento, 9 Washington C. C. 17; Borden v. Fitch, 15 Johns. 121; Shumway v. Stillman, 4 Cow. 293.

[2] Taylor v. Shew, 39 Cal. 536.

[3] Gebhard v. Garnier, 12 Bush, 321; Karns v. Kunkle, 2 Minn. 313.

[4] Low v. Burrows, 12 Cal. 181. How such a complaint should state the transcript, see Richardson v. Hickman, 22 Ind. 244.

[5] Brady v. Murphy, 19 Ind. 258; Adkins v. Hudson, Id. 392.

[6] Harlow v. Hamilton, 6 How. Pr. 475.

[7] Lafayette Ins. Co. v. French, 18 How. U. S. 404.

[8] Memphis Medical College v. Newton, 2 Handy, 163.

[9] Butcher v. Bank of Brownsville, 2 Kan. 70.

of the peace, in and for the town of....., in the county of ....., and state of....., having authority under and by virtue of an act of said state, entitled [title of act], passed on the.....day of....., 18...., to hold court, and having jurisdiction as such over actions of [state jurisdiction to include the cause of action].

II. That on the.....day of ...., 18..., at ....., aforesaid, the plaintiff commenced an action against the defendant before the said justice, by filing his complaint, and causing summons to be duly issued by said justice, on that day, for the recovery of [state what], which summons was duly and personally served on the defendant.

III. That on the.....day of....., 18..., in said action, the plaintiff recovered judgment, which was duly given by said justice against the defendant, for the sum of..... dollars, to wit, ...dollars for said debt, with ..... dollars for interest from the said date, and .....dollars costs.

IV. That defendant has not paid the same, nor any part thereof.

[Demand of Judgment.]

§ 806. **Action.**—It appears that the action of *indebitatus assumpsit* lies on a judgment of a justice of the peace.[1]

§ 807. **Before the Said Justice.**—The appropriate mode of pleading a judgment of a justice of the peace is to allege that it was recovered "before him," not "in his court."[2]

§ 808. **Costs.**—This should be inserted in the third allegation, if it would not otherwise appear that the amount of the debt did not exceed the jurisdiction.[3]

§ 809. **Designation of Office.**—It is necessary in California,[4] or in New York,[5] in pleading the determination of an officer of special jurisdiction, to designate the officer; an averment that such determination was duly made is sufficient.[6]

§ 810. **Jurisdiction of Person.**—To show that jurisdiction over the person had been acquired, it is necessary to aver,

[1] Green v. Fry, 1 Cranch C. Ct. 137.

[2] McCarthy v. Noble, 5 N. Y. Leg. Obs. 380.

[3] Smith v. Mumford, 9 Cow. 26.

[4] California Code Civ. Proc., sec. 456.

[5] New York Code, sec. 532.

[6] Carter v. Kaezley, 14 Abb. Pr. 147. The form of allegation, "recovered judgment, which was duly given," is suggested by the court in Crake v. Crake, 18 Ind. 156. As to how far other words may be deemed equivalent to "duly given," compare Willis v. Havemeyer, 5 Duer, 447; Hunt v. Dutcher, 13 How. Pr. 538. If the judgment was rendered in a justice's court, "duly" must be inserted: Thomas v. Robinson, 3 Wend. 268; Keys v. Grannis, 3 Nev. 548.

either that the party appeared, or that process was sued out and duly served on him.[1]

§ 811. **Jurisdiction of Justice.**—The authority under which the judgment was rendered should be set forth.[2] A general allegation that the justice had jurisdiction is not enough. The statute giving jurisdiction should be pleaded.[3] A judgment against the plaintiff for costs of a nonsuit only, is an exception to this rule.[4] But such facts need not be alleged, as residence of defendant, that summons was returned, that return was made thereon, that time of day was specified in summons, nor that court was held at the time and place specified.[5] After stating the facts on which jurisdiction depends, it is sufficient, without setting out the proceedings, to say, "such proceedings were had," that plaintiff recovered, etc.[6]

CHAPTER VIII.

LIABILITIES CREATED BY STATUTE.

§ 812. **Penalties under the Statute—General Form.**

Form No. 197.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the .... day of ....., 18..., at ....., the defendant [here state acts constituting a violation of the statute, either following the words of the statute, or setting forth the facts more specifically] against the form of the statute [or statutes, as the case may be], in such case made and provided. [See sec. 813, below.]

II. That hereby the defendant became indebted in the sum of [amount of penalty] to [one for whose use the action is given], whereby an action accrued to the plaintiff according to the provisions of [describing the statute in such terms as the case may require].

[DEMAND OF JUDGMENT.]

§ 813. **Attorney Practicing without License.**—An attorney practicing without a license may be punished as in other cases of contempt. The right to practice is not "property," nor in any sense a "contract," within the constitutional mean-

[1] Cornell v. Barnes, 7 Hill, 35; Quivey v. Baker, 37 Cal. 465.
[2] Stiles v. Stewart, 12 Wend. 473.
[3] Sheldon v. Hopkins, 7 Wend. 435; Stiles v. Stewart, 12 Id. 473.
[4] Turner v. Roby, 3 N. Y. 193.
[5] Barnes v. Harris, 4 N. Y. 375; 3 Barb. 603.
[6] Turner v. Roby, 3 N. Y. 193.

ing of those terms.[1] The right to practice is not a constitutional right, but a statutory privilege. But the authority of an attorney to appear will be presumed where nothing to the contrary appears.[2]

§ 814. **Copyright.**—A declaration for the penalty imposed for putting the imprint of a copyright upon a work not legally copyrighted, in the name of two persons, is bad on general demurrer.[3]

§ 815. **Failure to Pay Assessment.**—The failure of one partner in a ditch to pay his proportion of the expenses of the concern does not forfeit his right in the common property.[4] Where forfeiture is claimed under a mining regulation or custom, this regulation or custom will be most strictly construed under the claim of forfeiture.[5]

§ 816. **Ferries and Toll Bridges.**—In an action brought to recover damages by the owners of a licensed ferry against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran it for other than his own personal use or that of his family, and that the omission of these allegations was fatal.[6]

§ 817. **Forfeiture under Statute.**—When a forfeiture is purely the creation of statute, no other process or procedure can be made use of to enforce the forfeiture than that which the statute prescribes.[7] In an action to enforce a penalty or forfeiture imposed by statute, the claim is to be strictly construed.[8] If there be any rule requiring the payment of a debt, the rule can not apply to the case of a judgment rendered for a penalty under the penal statute.[9] An action founded on a statute to recover a penalty, where no penalty is imposed, can not be sustained.[10] In order to have a forfeiture take place, there must be some person who is entitled to receive the benefit of the forfeiture.[11]

[1] Cohen v. Wright, 22 Cal. 293.
[2] Hayes v. Shattuck, 21 Cal. 51; Wilson v. Cleaveland, 30 Id. 192; Holmes v. Rogers, 13 Id. 191; Turner v. Caruthers, 17 Id. 431.
[3] Ferrett v Atwill, 1 Blatchf. 151.
[4] Kimball v. Gearhart, 12 Cal. 27.
[5] Colman v. Clements, 23 Cal. 245; Wiseman v. McNulty, 25 Id. 280.
[6] Hanson v. Webb, 3 Cal. 286.
[7] Reed v. Omnibus R. R. Co., 33 Cal. 212.
[8] Askew v. Ebberts, 22 Cal. 263.
[9] Chester v. Miller, 13 Cal. 558.
[10] Board of Health v. Pacific Mail Steamship Company, 1 Cal. 197.
[11] Wiseman v. McNulty, 25 Cal. 280. How far the strict rules of the common law, as to pleading in criminal cases, are applicable to informations for forfeitures *in rem*, considered in The Palmyra, 12 Wheat. 1.

§. 818. **Forfeiture of Title to Real Estate.**—No forfeiture of real estate can take place for non performance of conditions precedent or subsequent, unless there are two contracting parties who have, at the same time, or successively, an interest in the estate upon which the condition is reserved.[1] No forfeiture accrues to a title otherwise good, by failure to present it to the board of land commissioners.[2] The United States, after the treaty of Guadalupe Hidalgo, did not become vested with any authority to prosecute a claim for forfeiture or escheat that had accrued in California to the Mexican government.[3]

§ 819. **Gaming.**—An allegation in a complaint that the parties kept a saloon for the purpose of gaming, and selling liquors and cigars, does not raise the presumption that the gaming was necessarily unlawful, or that the saloon was a common gaming house, as the word might apply to lawful games, as billiards etc.[4]

§ 820. **Marks and Brands.**—That in an action for a penalty for altering the inspector's marks on barrels of flour, it is necessary to set out the marks and the manner of the alteration.[5]

§ 821. **Office and Officers.**—In an action against an officer to recover a penalty imposed by a general statute, it is sufficient to refer to such statute, though the particular duty in question was created by a subsequent statute.[6]

§ 822. **Railroad Companies—Excessive Fare.**—In an action against a railroad company for breach of duty by such company in not conveying a passenger, it is not necessary for plaintiff to allege in his complaint a strict legal tender of his fare.[7] It is sufficient to allege that plaintiff was ready and willing, and offered to pay such sum of money as the defendant was legally entitled to charge. The transportation and payment of the fares are contemporaneous acts.[8] In an action against the New York Central Railroad Co. to recover a statutory penalty for exacting an excessive fare, it was held that it was not necessary that the complaint should set out the various enactments consolidating the several companies which make up the New York Central Railroad Company so as to show that the latter company is restricted to a fare of two cents per mile for

[1] Wiseman v. McNulty, 25 Cal. 230.
[2] Gregory v. McPherson, 13 Cal. 562.
[3] People v. Folsom, 5 Cal. 373.
[4] Whipley v. Flower, 6 Cal. 632.
[5] Cloud v. Hewett, 3 Cranch C. C. 199.
[6] Morris v. People, 3 Den. 381.
[7] Tarbell v. C. P. R. R. Co., 34 Cal. 616.
[8] Id.

each passenger; but that it was enough to allege that the defendants had been duly organized, that they were entitled to demand and receive of passengers a certain rate of fare, and that they had demanded and received a higher rate.[1]

§ 823. **Telegraph Messages.**—Where the telegraph company fails to transmit a message, upon compliance by the person contracting with it with the conditions required by law, an action lies for the penalty.[2] And the party who contracts is entitled to the penalty.[3]

§ 824. **Theatrical Exhibitions.**—A complaint which charges that the defendant "did willfully and unlawfully, on the first day of the week, commonly called Sunday, to wit, on the Sabbath day, get up, and in getting up and opening of a theater," contains a sufficient statement of the facts constituting the offense of getting up a theater on the Sabbath day.[4]

§ 825. **Statutory Action—Allegations.**—In an action on a statute, the party prosecuting must allege every fact necessary to make out his title and his competency to sue.[5] Thus, where the statute giving the cause of action prescribes what the plaintiff shall state in his complaint, and requires a reference to be made to the statute, the requirement must be complied with or the plaintiff can not recover.[6] But if a statute gives a new defense, or authorizes the introduction of evidence not previously admissible, the defendant may so shape his pleas as to avail himself of the benefits of the new law, and the old rules of pleading must yield to the statute.[7]

§ 826. **Penal Statutes—Allegations in Actions on.**—In penal actions founded on a statute, a reference to the statute is usually, but not necessarily, made[8] for the purpose of informing the defendant distinctly of the nature and character of the offense.[9] And in cases where no general form of complaint is given, the plaintiff must set forth the particular acts or omissions which constitute the cause of action.[10] But omitting to refer to the statute is a defect of form only.[11] In declaring on

[1] Nellis v. N. Y. Cent. R. R. Co., 30 N. Y. 505.

[2] Thurn v. Alta Tel. Co., 15 Cal. 472.

[3] Id.

[4] People v. Maguire, 26 Cal. 635; for complaint, see People v. Koll, 3 Keyes, 236.

[5] Fleming v. Bailey, 5 East, 313; 4 Johns. 193; Bigelow v. Johnson, 13 Id. 428; Fairbanks v. Town of Antrim, 2 N. H. 105; Ferrett v. Atwill, 1 Blatchf. 151; Austin v. Goodrich, 49 N. Y. 266.

[6] Schroeppell v. Corning, 2 N. Y. 132; and see Avery v. Slack, 17 Wend. 85.

[7] Cutts v. Hardee, 38 Ga. 350.

[8] Brown v. Harmon, 21 Barb. 510.

[9] Shaw v. Tobias, 3 Comst. 190.

[10] Slack v. Avery, 17 Wend. 86; People v. Brooks, 4 Den. 469; Bigelow v. Johnson, 13 Johns. 428.

[11] O'Maley v. Reese, 6 Barb. 658.

a penal statute, it is sufficient to pursue the words of the statute, and not essential to conclude "against the form of the statute."[1] The declaration must aver that the act complained of was done contrary to the statute.[2] A declaration founded exclusively upon a statute, and not maintainable at common law, must conclude "against the form of the statute."[3] A declaration, if founded on an amendatory act, which refers to and contains a former one, should conclude "against the statute," and not "statutes."[4] A declaration on a penal statute need not aver the uses to which the forfeiture is to be applied.[5]

Where a number of penalties are incurred in one act, they may all be included in one count. In an action against an officer to recover a penalty imposed by a general statute for any neglect or refusal to perform a duty, it is enough to refer to such statute, though the particular duty in question was created by a subsequent statute.[6]

Where a penalty is given by statute and no remedy is provided, debt will lie.[7] And this although it is uncertain.[8] In an action for debt, brought to recover several penalties (under section 1 of the act of 1790), against the master of a vessel for shipping seamen without articles, a single count for all the penalties is sufficient.[9] So also if an agreement contain a penalty, the plaintiff may bring debt for the same and for no more, or covenant, and recover more or less damages than the penalty;[10] and for several penalties incurred in one act, plaintiffs may declare generally in one count.[11] But only one penalty can be enforced for the same act.[12] Thus, under an ordinance forbidding both the sale of a thing and its exposure to sale, a single act of selling can not be separated so as to impose therefor two penalties. In case of an actual sale, the exposure to sale is merged in the sale.[13] Where two or more concur in the act of aiding, and but

[1] People v. Bartow, 6 Cow. 290; Lee v. Clark, 2 East, 333.

[2] Parker v. Haworth, 4 McLean, 373.

[3] Ch. Pl. 246, 405; Sears v. United States, 1 Gall. 257; Smith v. United States, Id. 261; 1 Saund. 135, n.; Jones v. Vanzandt, 2 McLean, 611. That it is essential, see Sears v. United States, 1 Gall. 257.

[4] Falconer v. Campbell, 2 McLean, 195.

[5] Sears v. United States, 1 Gall. 257.

[6] Morris v. People, 3 Den. 381. For exacting excessive fare on railroad: Nellis v. N. Y. C. R. R. Co., 30 N. Y. 505. Complaint against railway company for not ringing bell on approaching a crossing: See Wilson v. Roch. & Syr. R. R. Co., 16 Barb. 167.

[7] Jacob v. United States, 1 Brock. Marsh. 520.

[8] Corporation of Washington v. Eaton, 4 Cranch C. C. 352.

[9] People v. M'Fadden, 13 Wend. 396; Wolverton v. Lacy, 8 Law R., N. S., 672.

[10] Martin v. Taylor, 1 Wash. C. C. 1.

[11] People v. M'Fadden, 13 Wend. 396.

[12] Driskill v. Parish, 3 McLean, 631.

[13] City of Brooklyn v. Toynbee, 31 Barb. 282.

one penalty attaches, they may be sued together.[1] In an action for a statute penalty, intent to violate the law must be shown; but a neglect may be so gross as to amount to a criminal intent.[2] The repeal of a law imposing a penalty determines the action.[3]

§ 827. **Provisos and Exceptions.**—It is a general rule, that in pleading under a statute, it is sufficient to use the language of the statute, and though there are exceptions requiring specific facts to be stated where general language is used in the statute, yet it is not necessary in a civil proceeding to add to the language of the statute other general language, which does not make the pleading any more specific, because such other language was technically required in a common-law indictment.[4] But when a pleading is filed under a statute where there is an exception in the enacting clause, it must negative the exception; but where where there is no exception to the enacting clause, but an exception in the proviso thereto, or in a subsequent section of the act, it is matter of defense and must be shown by the defendant.[5] A public statute need not be recited or referred to in pleading, and all that seems material is that enough be stated to bring the case within the statute.[6]

§ 828. **Statutes, how Proved.**—As to whether an act is passed by the requisite vote, the printed statutes are presumptively correct, and the original on file conclusive.[7]

§ 829. **Venue in California.**—Actions for the recovery of a penalty or forfeiture imposed by statute, shall be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial.[8]

§ 830. **For Selling Liquor without a License.**

Form No. 198.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 ..., at ....., the defendant sold to one A. B. [or to divers persons] strong

[1] Partridge v. Naylor, Cro. Eliz. 480; F. Moore, 453; Rex v. Clark, Cowp. 610; Barnard v. Gostling, 2 East, 569; Warren v. Doolittle, 5 Cow. 678; compare Marsh v. Shute, 1 Den. 280; Ingersoll v. Skinner, Id. 540; Mayor of N. Y. v. Ordrenan, 12 Johns. 122; see also Palmer v. Conly, 4 Den. 374.

[2] Sturges v. Maitland, Anth. N. P. 208.

[3] People ex rel. Cook v. Board of Police, 40 Barb. 626; 16 Abb. Pr. 473.

[4] Jarvis v. Hamilton, 16 Wis. 574.

[5] Washburn v. Franklin, 28 Barb. 27; Great Western R. R. Co. v. Hanks, 36 Ill. 281; Lynch v. People, 16 Mich. 472; Faribault v. Hulett, 10 Minn. 30; Clough v. Shepherd, 31 N. H. 490; McGlone v. Prosser, 21 Wis. 273; but see Farwell v. Smith, 16 N. J. L. (1 Harr.) 133.

[6] McHarg v. Eastman, 7 Robt. 137; S. C., 35 How. Pr. 205; Bretz v. Mayor, 35 Id. 130; S. C., 4 Abb. Pr. (N. S.) 258; reversing 3 Abb. Pr. (N. S.) 478.

[7] People ex rel. v. Commissioners of Highways, 54 N. Y. 276; People v. Devlin, 33 Id. 269.

[8] California Code C. P., sec. 393.

liquors [or spirituous liquors, or wines], in quantities less than by the bottle [or otherwise, according to the terms of the ordinance or statute].

II. That the defendant had not then a license to sell liquors, as required by the act entitled "An act," etc. [giving title of act in full], passed on the ..... day of ...., 18..

III. That thereby the defendant became, and is indebted to the plaintiff in the sum and penalty of ..... dollars, for said act of selling [or, each and every of said acts of selling], whereby this action has accrued to the plaintiff, according to the provisions of said act, for the said sum of ..... dollars [or if more than one penalty is claimed, for the aggregate amount or sum of ..... dollars].

[DEMAND OF JUDGMENT.][1]

§ 831. Against a Witness, for Disobeying Subpœna.

Form No. 199.

[TITLE.]

I. That on the ..... day of ....., 18.., at ....., the plaintiff caused the defendant to be duly served with a subpœna commanding him to attend as a witness in ..... court, in and for the county of ....., in this state, on the ..... day of ....., 18.., there to give testimony on behalf of the plaintiff in an action in said court pending, wherein this plaintiff was the plaintiff, and one C. D. was defendant [or otherwise designate the proceedings].

II. That at the same time the plaintiff caused ..... dollars, the lawful fees of the said witness, to be paid [or tendered] to him.

III. That defendant failed to attend as commanded, whereby the defendant became indebted to the plaintiff in the amount of ..... dollars, according to the provisions of the statute [describe the statute].

IV. That by reason of the premises, the defendant forfeited to the plaintiff the sum of ..... dollars.

[If special damages are claimed, add:] V. And for a second cause of action, the plaintiff alleges that because of the said failure of the said defendant to attend said trial as such witness as aforesaid, the plaintiff, when said action was called for trial, was compelled, for want of the testimony of said defendant, without whose testimony he could not safely proceed to the trial of said action, to move the said court to continue the said action;

[1] For another form, see People v. Bennett, 5 Abb. Pr. 384. To follow the words of the act is sufficient: See Cole v. Jessup, 10 N. Y. 96; 10 How. Pr. 515.

and the said court did continue the same, and the plaintiff was compelled to pay on said continuance, as c sts thereof, ... dollars, which sum he was so compelled to pay by reason of the said failure of the said defendant to attend as such witness as aforesaid, to the damage of the plaintiff in the said sum of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 832. **Witness Refusing to Answer.**—An action lies at common law against a witness refusing to answer or attend under a subpœna.[1] The complaint must aver that the witness fees were paid or tendered to him.[2] It would seem that a general allegation that he was legally subpœnaed is insufficient.[3]

§ 833. **For Violation of Ordinance of Board of Supervisors.**

Form No. 200.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the ..... day of ....., 18..., the board of supervisors of the county of ....., in pursuance of the power in them vested by law, passed a law entitled "An order, regulation or ordinance, etc. [giving title of the same] a copy of which is annexed as a part of this complaint.

II. That since the passing thereof, to wit, on the ..... day of ....., 18.., the defendant [here state fully wherein the defendant has disobeyed the order], contrary to the provisions of the said ordinance above mentioned.

III. That by reason of the premises, the defendant forfeited to the plaintiff the sum of ..... dollars.

[DEMAND OF JUDGMENT.][4]

§ 834. **Essential Allegations.**—In general, the by-laws of all corporate bodies, including municipal corporations, must be set forth in pleading, when they are sought to be enforced by an action, or set up as a protection.[5] In Indiana a copy of the by-law or ordinance should be made a part of the complaint.[6] But the authority to enact may be averred in general terms.[7]

[1] King v. The Inhabitants etc., Dougl. 561; Gorham v. Thompson, Peake, 60; Warner v. Lucas, 10 Ohio, 336.

[2] McKeon v. Lane, 1 Hall, 356.

[3] Id.

[4] This is substantially the form of the complaint in Smith v. Levinus, 8 N. Y. 472.

[5] Wilc. on Mun. Corp., pt. 1, sec. 430; Harker v. Mayor etc. of N. Y., 17 Wend. 199; People v. Mayor etc. of N. Y., 7 How. Pr. 81.

[6] Green v. Indianapolis, 22 Ind. 192.

[7] Stuyvesant v. Mayor of N. Y., 7 Cow. 603.

CHAPTER IX.

FOR MONEY HAD AND RECEIVED TO PLAINTIFF'S USE.

§ 835. Common Form.

Form No. 201.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., [or at sundry times between the ..... day of ....., 18..., and the ..... day of....., 18..., at .....], the defendant received the sum of .... dollars from one A. B., to and for the use of the plaintiff.

II. That thereafter, on the ..... day of ....., 18... [or before the commencement of this action], the plaintiff demanded payment thereof from the defendant.

III. That the defendant has not paid the same, nor any part thereof [except, etc.]

[DEMAND OF JUDGMENT.][1]

§ 836. **Demand.**—It is not necessary that the plaintiff, in an action for money received by defendant for his use, should make a demand before suit, where it was the duty of the defendant to have remitted the money.[2] No demand is necessary before action brought to recover back an illegal tax;[3] so of moneys collected by sheriff.[4]

§ 837. **Essential Averments.**—The common allegation that the defendant received money "for the use of the plaintiff," is open to the objection on the ground of its indefiniteness. In some cases it has been held bad on demurrer.[5] A complaint which avers "that the defendant received a sum of ..... dollars, belonging to or on account of the plaintiff, and which is now due him," states facts sufficient to constitute a cause of action.[6] Thus, where the complaint charges that A., being indebted to the plaintiff in a sum of money, it was agreed between the plaintiff and defendant that A. should pay the same to plaintiff at the request of plaintiff, and thereafter A. paid to defendant said sum in gold coin of the United States and for the

[1] In those cases where demand is not necessary, the second paragraph may be omitted. Where a demand is necessary to charge the defendant with interest, the date of the demand should be inserted.

[2] Stacy v. Graham, 14 N. Y. 492; Howard v. France, 43 Id. 593; Keyser v. Shafer, 2 Cow. 437.

[3] Newman v. Supervisors of Livingston Co., 45 N. Y. 676.

[4] Nelson v. Kerr, 59 N. Y. 224.

[5] Lienau v. Lincoln, 2 Duer, 670.

[6] Betts v. Bache, 14 Abb. Pr. 279.

use and benefit of plaintiff, the defendant refused to pay the same to the plaintiff upon request duly made, an action to recover said sum in gold coin is an action for money had and received, and defendant is not charged as a bailee.[1]

When a person recovers the money of another, and applies it to his own use, the law implies a promise to repay it.[2] Where one receives at the request of another a sum for a third person, with directions to pay the same over, it is equivalent to an express promise to pay the same, and the latter may maintain an action for money had and received.[3] And no consideration need be shown.[4] Where one receives the money of another, and has not the right conscientiously to retain it, a privity between the true owner and the receiver will be implied, as well as a promise to pay it.[5] Such implied promise to pay is a fiction which need not be alleged.[6]

§ 838. **Nature of the Action—When it Lies.**—The general rule is, that an action for money received lies, whenever money has been received by the defendant, which *ex æquo et bono* belongs to the plaintiff;[7] or which in equity and conscience he has no right to retain,[8] whether there be any privity between the parties or not. For it has been held there need be no privity of contract between the parties, in order to support this action, except that which results from one man's having another's money, which he has not a right conscientiously to retain.[9] In an authoritative case it has been decided that this action lies: 1. Wherever the defendant has received money which he is bound in justice and equity to refund; 2. Where an agent is not the mere carrier or instrument for transmitting the fund, but has the power of retaining it, and before he has paid over the money, has received notice of the plaintiff 's claim, and a warning not to part with the fund; 3. Where there exists a privity between the plaintiff and defendant.[10]

§ 839. **The Same—Duress—Protest.**—That money extorted under duress may be recovered back in this form of action has been long established. In such action the complaint

[1] Wendt v. Ross, 83 Cal. 650.
[2] Dumond v. Carpenter, 3 Johns. 183.
[3] Weston v. Barker, 12 Johns. 276; Therusson v. McSpedon, 2 Hilt. 1; Delaware etc. Co. v. Westchester Co. Bank, 4 Den. 97. But see Seaman v. Whitney, 24 Wend. 260; Turk v. Ridge, 41 N. Y. 201; and Williams v. Everett, 14 East, 590, where distinctions are taken.
[4] Judson v. Gray, 17 How. Pr. 289; Berry v. Mayhew, 1 Daly, 54.
[5] Caussidiere v. Beers, 2 Keyes, 198.
[6] Boxbie v. Wood, 24 N. Y. 607.
[7] Tutt v. Ide, 3 Blatchf. 249.
[8] Kreutz v. Livingston, 15 Cal. 344.
[9] Mason v. Waite, 17 Mass. 560; Buel v. Boughton, 2 Den. 91; Lockwood v. Kelsea, 41 N. H. 185.
[10] Cary v. Curtis, 3 How. U. S. 236.

must state that it was wrongfully obtained, and not state a mere conclusion of law; but the facts should be fully detailed, so that the court may see from the facts that the payment was compulsory.[1] It is not sufficient to allege compulsion in a general way. Money extorted by duress of goods may be recovered.[2]

Thus, a complaint in an action to recover money wrongfully obtained, under color of judicial proceedings, must contain such averments as will exclude the idea that the money could have been lawfully obtained.[3] But the influence exerted by the provisions of the statutes of the United States, requiring stamps to be placed on passage tickets by steamer from San Francisco to New York, does not constitute the kind of coercion or compulsion which the law recognizes as sufficient to render the payment therefor involuntary.[4] Generally, to constitute compulsion or coercion, so as render a payment involuntary, there must be some actual or threatened exercise of power, possessed or supposed to be possessed by the party exacting or receiving the money.[5] The object of the protest is to take from the payment its voluntary character, and conserve to the party the right to recover it back. The fact that a party pays money under protest does not change the character of the transaction or enable him to recover it back, unless the payment was under duress or coercion, or where undue advantage was taken of his situation.[6]

Where money was not credited on an account upon which judgment by default was rendered it may be recovered back.[7] Where a special contract remains open, the remedy is on the contract, but if the contract has been put an end to, an action for money had and received lies to recover any payment that has been made under it.[8]

§ 840. **When it does not Lie—Voluntary Payments.**—The simple facts that A., owing money to B., chose to pay it to

[1] Commercial Bank v. Rochester, 41 Barb. 341.

[2] Astley v. Reynolds, 2 Stra. 915; Bates v. Johnson, 3 Johns. Cas. 238; 4 T. R. 485; Id. 561; Chase v. Dwinal, 7 Greenl. 134; Chase v. Taylor, 4 Harr. & J. 54; Little v. Gibson, 3 N. H. 508; Tutt v. Ide, 3 Binchf. 249; McMillen v. Richards, 9 Cal. 365.

[3] Funkhouser v. How, 17 Mo. 225; Chandler v. Sanger, 114 Mass. 364.

[4] Garrison v. Tillinghast, 18 Cal. 404.

[5] Brumagin v. Tillinghast, 18 Cal. 265.

[6] Brumagin v. Tillinghast, 18 Cal. 265; Kansas & Pac. R. R. Co. v. Wyandotte Co., 16 Kan. 587.

[7] Parker v. Danforth, 16 Mass. 306; Richardson v. Maine Ins. Co., 6 Id. 14; Loring v. Mansfield, 17 Id. 394; Whitcomb v. Williams, 4 Pick. 228; Gary v. Hull, 11 Johns. 441; Cobb v. Curtis, 8 Id. 470; Phil. on Ev.; Cow. & H. 832; *contra*, 1 N. H. 33; Mitchell v. Sanford, 11 Ala. 695; Binck v. Wood, 43 Barb. 315.

[8] Chesapeake and Ohio Canal Co. v. Knapp, 9 Pet. 541.

C., under the impression that C. was entitled to control the services of B., and to receive all compensation therefor, do not entitle B. to maintain an action against C. for money had and received.[1] Under a count for money had and received, a surety can not recover of his principal for money paid by the surety on account of his liability as such.[2] To sustain a count for money had and received it must appear that the defendant had received money due to the plaintiff, or something which he had really or presumptively converted into money before suit brought, or which he had received as money, and instead of it.[3] Money voluntarily paid upon a claim of right with full knowledge of all the facts, can not be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability.[4] Money voluntarily paid can not be recovered back, even though it could not have been enforced by law.[5] So money advanced on part performance of an agreement can not be recovered back.[6]

§ 841. **Statute of Limitations.**—Where the promise is laid of a day more than two years prior to the commencement of the action, the complaint is demurrable on the ground that it shows the demand to be barred by the statute of limitations.[7]

§ 842. **Same, against Attorney or Agent with Demand.**

Form No. 202.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at the county of ....., state of ....., the defendant received from the plaintiff, as the agent of said plaintiff, the sum of ..... dollars, to the use of the said plaintiff.

II. That thereafter, and before this action, the said plaintiff demanded payment thereof from said defendant.

III. That the defendant has not been paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 843. **Liability of Attorney and Agent.**—An attorney is not liable for moneys collected until after a demand or instructions to remit.[8] But the right to a demand may be waived.

[1] Murphy v. Ball, 38 Barb. 262.

[2] Child v. Eureka etc. Works, 44 N. H. 354.

[3] Hatten v. Robinson, 4 Blackf. (Ind.) 479; Mason v. White, 17 Mass. 56; Ainslie v. Wilson, 7 Cow. 662.

[4] Brumagim v. Tillinghast, 18 Cal. 265.

[5] Corkle v. Maxwell, 3 Blatchf. 418; Commercial Bank v. Rochester, 42 Barb. 488.

[6] Hansbrough v. Peck, 5 Wall. U. S. 497.

[7] Keller v. Hicks, 22 Cal. 457.

[8] Beardsley v. Root, 11 Johns. 464; Stafford v. Richardson, 15 Wend. 302; Taylor v. Bates, 5 Cow. 376; Walradt v. Maynard, 3 Barb. 581.

And where, an attorney set up a claim against his client to a larger amount, it was held a waiver from a demand.[1] Attorneys as partners are liable, although it was paid to one of them, and has been demanded from him only.[2] A person not an attorney, who collects a note at the request of another is liable for the amount, after a reasonable time, without demand.[3] Money collected by a subagent may be recovered.[4] Or money paid to an agent, if before it be paid to the principal, notice be served upon the agent that it will be reclaimed.[5]

§ 844. **Demand Essential.**—A count in a complaint in such an action is bad when it is not alleged that demand has been made on defendant; as a party receiving money for the use of another is rightfully in possession till the same is demanded.[6] One who has received money, standing in the position of trustee, *e. g.*, a collecting agent, is in general not liable in an action for money received until demand is made or some breach of trust or duty committed.[7] As where a bank receives money it can not be sued until after it has been drawn for.[8] But a deposit with a stockholder, or an alleged wager, may be sued for without a previous demand, where the money has been paid over before the action.[9]

§ 845. **Sufficient Allegations.**—A complaint which alleges that the defendant was employed as plaintiff's agent for the purchase of stock, that in settlement between the seller and defendant, the former was found to be indebted to the latter, as the plaintiff's agent, in a certain sum, which he paid, but which the defendant refuses to pay to the plaintiff, states a sufficient cause of action.[10] A complaint against an agent for money received, who pretends to have been robbed thereof, may properly allege simply that the defendant being in possession of the plaintiff's property as his agent, converted the same to his own use.[11] That defendant, as such agent, had collected from divers persons divers sums, either stating the aggregate or asking an accounting, is sufficient.[12] In an action by a corporation to recover funds received by the treasurer thereof, if the complaint shows the relation of the parties, and gives a statement of the

[1] Id.; and see Satterlee v. Frazer, 2 Sandf. 141.
[2] McFarland v. Crary, 6 Wend. 297; compare Ayrault v. Chamberlin, 26 Barb. 83.
[3] Hickok v. Hickok, 13 Barb. 632.
[4] Wilson v. Smith, 3 How. U. S. 763.
[5] Wood v. United States, Dev. 55
[6] Reina v. Cross, 6 Cal. 31; Greenfield v. Str. "Gunnell," Id. 68.
[7] Walrath v. Thompson, 6 Hill, 540.
[8] Downs a. Phœnix B'k, 6 Hill, 297.
[9] Ruckman v. Pitcher, 1 N. Y. 392; see Johnson v. Russell, 37 Cal. 670.
[10] Bates v. Cobb, 5 Bosw. 29.
[11] Frost v. McCargar, 29 Barb. 617.
[12] West v. Brewster, 1 Duer, 647.

moneys received by him, and that the defendant is indebted, it is sufficient. A demand will be inferred, and if none were made, defendant should pay the debt, but not the costs.[1]

§ 846. **Who may Recover.**—An action for money had and received is proper, when a recovery is sought of money which defendant has received and refused to pay on demand to the plaintiff, who is entitled to it.[2] Where an agent or servant applies money of his employer, in his hands, to discharge the debt of a third person, the employer may recover it from the payee as money received to his use, if the payee received it with a knowledge of the facts.[3] Either one of the several joint owners of claims against a third person, they not appearing to be partners, may maintain an action against an agent to recover his share of money had and received by the latter from the debtor.[4] An assignee to recover a surplus collected by a creditor, or of the assignor, must give notice of the assignment, and make a demand.[5]

§ 847. **The Same—Another Form.**

Form No. 203.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ..... 18..., the defendant was the agent of the plaintiff in [stating generally the employment], that he collected and received as such agent, from divers persons, certain sums of money, for and on account of the plaintiff, amounting in the whole to the sum of ..... dollars; no part of which has been paid by defendant to the plaintiff.

II. That on the ..... day of ....., 18..., at ....., the plaintiff demanded payment of the same from the defendant.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 848. **Notes Received.**—Under a complaint in an action against an agent for money had and received, the plaintiff may recover where it appears that the defendant received notes which were good and collectible, and by his transactions he released the debtor and deprived his principal of all remedy except against himself.[6]

[1] Second Avenue R. R. Co. v. Coleman, 24 Barb. 300.
[2] Stanwood v. Sage, 22 Cal. 517.
[3] Amidon v. Wheeler, 3 Hill, 137.
[4] Allen v. Brown, 51 Barb. 86.
[5] Sears v. Patrick, 23 Wend. 528.
[6] Corlies v. Cumming, 6 Cow. 183, note; Floyd v. Day, 3 Mass. 403; Beardsley v. Root, 11 John. 464; Allen v. Brown, 51 Barb. 86.

§ 849. **For Money Received by Defendant Through Mistake.**

Form No. 204.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . ..... day of ....., 18..., at ....., the defendant presented to the plaintiff an account of mutual dealings theretofore had between them, which said account set forth a balance due from the plaintiff to the defendant of the sum of .... dollars.

II. That the plaintiff, believing said account to be correctly stated, then paid said sum of ..... dollars to the defendant.

III. That in fact said account was not correctly stated, but that it overcharged the plaintiff with the sum of ..... dollars by an error in adding up the items thereof [or otherwise, specifying the error].

IV. That defendant has not paid the said sum of ..... dollars to the plaintiff, though requested so to do.

[DEMAND OF JUDGMENT.]

§ 850. **When the Action Lies.**—Money paid under a mutual mistake of facts may be recovered back.[1] But money paid by mistake of law can not be recovered back, there being no difference between money paid in ignorance of law and money paid by mistake of law.[2]

§ 851. **Essential Averments—Demand.**—Where money is paid by mistake, notice of the mistake and demand of repayment before suit to recover it back are not necessary. The party receiving the money under such circumstances is not a bailee or a trustee. But such a demand may affect the question of interest.[3] The facts constituting the mistake must be alleged.[4] A direct averment of mistake is unnecessary, if the facts upon which it is founded are stated.[5] An allegation of fraud will not support evidence of mistake, nor *vice versa*.[6]

§ 852. **For Price of Goods Sold by a Factor.**

Form No. 205.

[TITLE.]

The plaintiff complains, and alleges:

[1] Burr v. Veeder, 3 Wend. 412; Wheadon v. Olds, 20 Id. 174; Canal Bank v. Bank of Albany, 1 Hill, 287; Bank of Commerce, v. Union Bank, 3 N. Y. 230; Duncan v. Berlin, 60 Id. 151; Manchester v. Burns, 45 N. H. 482.

[2] Schlesinger v. United States, 1 Nott & H. 16; Elliott v. Swartwout, 10 Pet. 137.

[3] Utica Bank v. Van Gieson, 18 Johns. 485.

[4] Finch v. Hollinger, 47 Iowa, 173; Stephens v. Murton, 6 Oreg. 193; Schoonover v. Dougherty, 65 Ind. 463; Evarts v. Steger, 5 Oreg. 147.

[5] Welles v. Yates, 44 N. Y. 525; Maher v. Hibernia Ins. Co., 67 Id. 283.

[6] Stephens v. Murton, 6 Oreg. 193; Leighton v. Grant, 20 Minn. 345.

I. That on the ..... day of ....., 18.., at ....., the defendant, in consideration of his reasonable commissions, agreed with plaintiff to sell for plaintiff certain goods [fifty barrels of flour].

II. That on the ..... day of ....., 18..., at ....., he delivered to defendant [fifty barrels of flour], for sale upon commission.

III. That on the ..... day of ....., 18... [or on some other day unknown to the plaintiff, before the ..... day of ....., 18...], the defendant sold the said merchandise for ..... dollars.

[IV. That the commission and expenses of the defendant thereon amounted to ..... dollars.]

V. That on the ..... day of ....., 18..., the plaintiff demanded from the defendant the proceeds of the said merchandise.

VI. That he has not paid the same, nor any part thereof.

[Demand of Judgment.][1]

§ 853. **Essential Averments—Demand.**—In an action against an agent for not accounting, etc., a request to account and pay over must be alleged and proved.[2] An express demand should be alleged.[3] In an action against a factor for the proceeds of goods sold, of which he apprised his principal, a demand must be shown, unless he had instructions to remit, or the usage of his business made it his duty to do so without instructions.[4] If the complaint in an action for the price of goods sent on commission alleges that defendant sold, but did not account to plaintiff, the plaintiff must prove that a sale actually took place.[5]

§ 854. **Election of Remedy—Waiver of Tort.**—Under a complaint which contained a count for indebtedness from the defendant to the plaintiff, for property sold and delivered, and money received to the plaintiff's use, the plaintiff may prove a tortious taking by the defendant, and the sale of the property

[1] This form is drawn on the presumption that the factor has not accounted. If he has accounted, but not paid, the better form is on an "account stated." If he has not accounted, it is improbable that the plaintiff will know the precise amount of his expenses, and it is not necessary to credit him with them in the complaint: N. Y. Code Comm'rs, note. The third allegation is not essential, but may prevent any answer setting up his claim.

[2] Bushnell v. McCauley, 7 Cal. 421. The distinction, in respect to the necessity of proving a demand, between an action for not accounting, and an action for not paying over, is discussed in Cooley v. Betts, 24 Wend. 203.

[3] Baird v. Walker, 12 Barb. 298: Halden v. Crafts, 4 E. D. Smith, 490.

[4] Cooley v. Betts, 24 Wend. 203; Ferris v. Paris, 10 Johns. 285; Halden v. Crafts, 4 E. D. Smith, 490.

[5] Elbourne v. Upjohn, 1 C. & P. 572.

by him, and the receipt of the money, and the waiver of the tort, and sue for the money had and received, or for the value of the property, as for goods sold and delivered. If the wrong-doer sells the property, and receives the money therefor, an action lies at the suit of the owner for money had and received, and such an action is a waiver of the tort.[1] In such an action it is not necessary to state how, or under what circumstances, the money came to the defendant's hands. The receipt of the money to the plaintiff's use is the fact which constitutes the cause of action.[2]

§ 855. Against Factor, for Price of Goods Sold on Credit.

Form No. 206.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18...., the plaintiff employed the defendant to sell certain goods and merchandise, of the value of ..... dollars, upon commission, and delivered the same to the defendant, who then promised to sell them, and be responsible to the plaintiff for the price thereof.

II. That on the ..... day of ....., 18...., as the plaintiff is informed and believes, the defendant sold said goods and merchandise for the sum of ..... dollars, on a credit of ..... months from that date, which credit expired before the commencement of this action.

III. That the commission and expenses of the defendant thereon amount to ..... dollars.

IV. That plaintiff further alleges, on information and belief, that the sum of ..... dollars is the price of said goods and merchandise, after deducting said charges.

V. That on the ..... day of ....., 18..., at ....., the plaintiff demanded of the defendant payment of the said sum of ..... dollars.

VI. That he has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 856 **Default of Purchaser.**—It is unnecessary for the plaintiff to aver that the purchaser was in default, nor is it nece sary to aver a demand on him, though it might be otherwise if the factors guaranteed the payment of a price to be collected by the principal.[3]

[1] Putnam v. Wise, 1 Hill, 234, 240, note a; Schreppel v. Corning, 2 Seld. 112; Roth v. Palmer, 27 Barb. 652.

[2] Scovil v. New, 12 How. Pr. 326; Allen v Patterson, 3 Seld. 476; Harpending v. Shoemaker, 37 Barb. 270; compare Byxbie v. Wood, 24 N. Y. 607.

[3] 1 Pars. on Cont. 78; Milliken v. Byerly, 6 How. Pr. 214.

§ 857. **Demand.**—The rule is settled in New York, that a foreign factor is not liable to an action for the proceeds of sales made by him for account of his principal on commission, until a demand made by the principal, or instructions to remit.[1]

§ 858. **Against Broker for Proceeds of Note Discounted.**

Form No. 207.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the plaintiff employed the defendant to negotiate a promissory note, the property of the plaintiff, made by one A. B. [describe the note], and thereupon he delivered the same to the defendant, who undertook to negotiate the same for a reasonable commission, and to pay the proceeds over to the plaintiff.

II. The plaintiff further alleges, on information and belief, that on the ..... day of ....., 18....., the defendant procured said note to be discounted at the ..... Bank, and received as the proceeds thereof the sum of ..... dollars.

III. That the commission and expenses of the defendant thereon amount to .....

IV. That on the ..... day of ....., 18...., at....., the plaintiff demanded of the defendant ..... dollars, the balance of the proceeds of said note after deducting said expenses and commission.

V. That he has not paid the same.

[Demand of Judgment.]

§ 859. **Unauthorized Sale.**—For selling without authority stock which the broker had purchased for the plaintiff, if this fact be shown in the complaint, and that it was to be delivered to him within a specified time at his option, but that he sold it meanwhile against his express instructions, a demand and tender on the part of the plaintiff need not be alleged.[2]

[1] Walden v. Crafts, 2 Abb. Pr. 301; Halden v. Crafts, 4 E. D. Smith, 490; Ferris v. Paris, 10 Johns. 285; Lillie v. Hoyt, 5 Hill, 395.

[2] Clark v. Meigs, 13 Abb. Pr. 467.

CHAPTER X.

FOR MONEY LENT.

§ 860. Lender against Borrower.

Form No 203.

[TITLE.]

The plaintiff complains, and alleges;

I. That on the ..... day of ....., 18.., at ....., he lent to the defendant, at his request, ... dollars.

II. That the defendant has not paid the same, nor any part thereof.

Wherefore the plaintiff demands judgment for ..... dollars, with interest from the ..... day of ....., 18...

§ 861. **Essential Averments.**—Every material fact must be alleged with certainty; and all those facts which are necessary to distinguish the transaction in question from every other like transaction are material. These details are often immaterial, in the sense that no issue can be made upon them; yet are material as matter of description. For instance: if to the plaintiff's allegation that "at San Francisco, he lent," the defendant should answer that he never borrowed any money from the plaintiff at San Francisco, the answer would be frivolous. Time is not ordinarily material, except the order of occurrences, and to fix the date when interest began. When no time is fixed for the repayment of the loan, the presumption is that it was to be paid immediately.[1] Nor is it necessary to show that the debt had become payable at the commencement of the action, as that is matter of defense to be set up in the answer.[2] But whenever time is material, as in the case of demand and notice to charge an indorser, it must be directly and truly stated.[3]

It has been held that an allegation that the money was lent at the defendant's request may be omitted.[4] Although it is necessary to prove a request in order to constitute a loan.[5] But in general, a request in such case will be implied.[6] Where a special request is necessary to be averred, the general allegation of "though often requested" is not sufficient.[7] The defect, how-

[1] Peets v. Bratt, 6 Barb. 662.
[2] Smith v. Holmes, 19 N. Y. 271; Maynard v. Talcott, 11 Barb. 569.
[3] Castro v. Wetmore, 16 Cal. 379.
[4] Victors v. Davis, 1 Dowl. & L. 984.
[5] Brown v. Garnier, 6 Taunt. 389.
[6] See Victors v. Davis, 1 Dowl. & L. 984; see also, in this connection, Brown v. Garnier, 6 Taunt. 389; S. C., 1 Eng. Com. L. R. 421, where it was held that "hired" implies a request.
[7] Bush v. Stevens, 24 Wend. 256; Whitton v. Whitton, 38 N. H. 127.

ever, is cured by verdict.[1] In an action to recover money loaned, if the complaint charges the indebtedness, the manner in which it accrued, the promise to pay, and the refusal, it is sufficient.[2] It is not necessary to state when the debt was to be repaid, except for the purpose of fixing a date for interest. The presumption of law is, that it was to be paid immediately.[3] Nor is it necessary to show that the debt was due at the commencement of the action. If it was not, that is matter of defense, to be set up in the answer.[4] Where the count, in an action for money lent and advanced, sets forth a demand for a certain sum, and the jury find a verdict for a larger sum, it is not erroneous, if the declaration covered the larger sum in the *ad damnum*.[5] It may be doubted whether the allegation of non-payment is necessary.[6]

In an action where the complaint set out a draft drawn by defendants on a house in Boston, which it avers was drawn with the understanding that plaintiff should pay the same, but did not aver that after paying the draft, he canceled it, and delivered it up to the defendant; it was held that the defects were fatal in this form of action.[7]

§ 862. **Payments Made on Account.**—The plaintiff need not state payments made on account, as this is matter of defense. But where the complaint is verified, there is a necessity to do so; and in such case he should briefly state what amount has been paid.[8] As any payments must be pleaded, it is certain that the most general form of averring non-payment is sufficient. It is not necessary to add "or any part thereof." Although n t necessary, it is highly proper to credit the defendant with any payments.

§ 863. **The Same—No Time for Payment Agreed on.**

Form No. 209.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., he loaned the defendant, for his accommodation, and at his request, and without any time being agreed on for repayment, the sum of ..... dollars.

[1] Leffingwell v. White, 1 Johns. Cas. 99.
[2] Williams v. Glasgow, 1 Nev. 538.
[3] Peets v. Bratt, 6 Barb. 662.
[4] Smith v. Holmes, 19 N. Y. 271.
[5] Mill v. Bank of United States, 11 Wheat. 431, at p. 440.
[6] See Lanning v. Carpenter, 20 N. Y. 458; McKyring v. Bull, 16 Id. 297.
[7] Lambert v. Slade, 3 Cal. 330.
[8] Van Demark v. Van Demark, 13 How. Pr. 372; Giles v. Betz, 15 Abb. Pr. 285.

II. That he has demanded payment of the same, but the defendant has not paid said sum of ..... dollars, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 864. By Assignee of Lender against Borrower.

Form No. 210.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant was indebted to one A. B., in the sum of ... . dollars, on an account for money lent by said A. B. to the defendant.

II. That on the ..... day of ....., 18..., at ....., the said A. B. assigned said indebtedness to the plaintiff, of which assignment defendant had due notice.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.][1]

§ 865. Partners Lenders, against Partners Borrowers.

Form No. 211.

[TITLE.]

A. B. and C. D., the plaintiffs, complain of E. F. and G. H., the defendants, and allege:

I. [Allege partnership as in Form 104.]

II. That on the ..... day of ....., 18..., at ... ., the plaintiffs loaned to the defendants at their request the sum of [five hundred] dollars, on condition that it should be repaid on demand, with interest from that date, at ..... per cent per month.

III. That plaintiffs have demanded payment thereof.

IV. That defendants, or either of them, have not paid said sum, and the interest, or any part thereof.

Second. And for a second cause of action, the said plaintiffs allege:

I. That on the ..... day of ....., 18..., at ..... ., the plaintiffs, at the special instance and request of the said defendants, paid, laid out, and expended for the said defendants, and to and for their use and benefit, the sum of [five hundred] dollars;

[1] This form of complaint should only be employed in cases where the items of the claim are embraced in an account: Allen v. Patterson, 7 N. Y. 476. For authorities in support of the above form, consult Freeborn v. Glazier, 10 Cal. 337; De Witt v. Porter, 13 Id. 171; Beekman v. Platner, 15 Barb. 550; Second Avenue R. R. Co. v. Coleman, 24 Barb. 300. Where the action is not on an account, this complaint may be obnoxious to a motion to make it more definite and certain, if defendant is prejudiced by its want of particularity: Eno v. Woodward, 4 N. Y. 249; see also Wood v. Anthony, 9 How. Pr. 78; Cheesbrough v. New York & Erie R. R. Co., 13 Id. 557; Hall v. Southmayd, 15 Barb. 32. But not necessarily so: Adams v. Holley, 12 How. Pr. 326.

in consideration whereof, the said defendants promised the said plaintiffs to pay unto the said plaintiffs the sum of [five hundred] dollars on demand, together with interest thereon.

II. That on the ..... day of ....., 18.., at ....., the plaintiffs demanded payment thereof.

V. That the defendants, or either of them have not paid the same, the interest or any part thereof; except, etc. [State briefly the total payments.]

[DEMAND OF JUDGMENT.]

CHAPTER XI.

FOR MONEY PAID.

§ 866. **For Money Paid to a Third Party at Defendant's Request.**

Form No. 212.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., at the request of defendant, plaintiff paid to one A. B..... dollars.

II. That in consideration thereof, defendant promised to pay the same to plaintiff.

III. That on the ..... day of ..... 18.., the plaintiff demanded payment of the same from the defendant, but he has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 867. **Action for, when it Lies.**—In this action there may be a recovery of money which an acceptor has paid for the drawer.[1] or which a surety has been obliged to pay for his principal.[2] In general, it lies upon an implied engagement by the defendant to repay.[3] But the objection that there was a special agreement can not defeat the action for money paid, when the written contract produced contained nothing more than what the law would imply.[4] Where the plaintiff in an action omitted to state the amount of money advanced and sought to be recovered, the defect is not cured by a bill of sale filed with a petition, though it contains a statement of the amount advanced.[5] In an action to recover back money re-

[1] Whitwell v. Brigham, 19 Pick. 121.
[2] Ward v. Henry, 5 Conn. 598.
[3] Grissell v. Robinson, 32 Eng. C. L. 15.
[4] Gibbs v. Bryant, 1 Pick. 118.
[5] Allen v. Shortridge, 1 Duval (Ky.) 34.

ceived by the defendant from the plaintiff, words in the complaint charging fraud may be regarded as a matter of inducement. The fraud need not be proved.[1] Money fraudulently received from a bank may be sued for before the note given to the bank becomes due.[2] Or money received on a prize drawn by fraudulent means in a lottery.[3] Where a third person receives money due from a debtor to his creditor, and does not pay it over to the creditor, in consequence of which the creditor brings an action against the debtor and recovers his demand, the debtor may sue such third person to recover back the former payment.[4]

§ 868. **Essential Allegations—Demand—Promise.**—No demand is necessary. It is inserted here only as an example of the mode of alleging demand when it is desired to fix a date for the commencement of interest. An allegation of promise is not absolutely necessary, as the law will imply a promise; but as an express promise is almost already made in such cases, it is better to state it. If no express promise is made, none should be pleaded.[5] The statute of frauds prescribes that "every special promise to answer for the debt, default, or miscarriage of another," is void if not in writing. But it need not be alleged in the complaint that the promise was "in writing." Money paid upon a contract which is invalid under the statute of frauds, can not be recovered back so long as the other party is ready and willing to perform on his part.[6]

§ 869. **By One having Paid Debt of Another, to be Repaid on Demand.**

Form No. 213.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the .... day of ....., 18.., at....., he paid to the use of the defendant, at his request, and on condition that the same should be repaid on demand, the sum of .... dollars, to one A. B., for one quarter's rent of the house then occupied by the defendant [or state the character of the debt].

[II. That the plaintiff, on the .... day of ....., 18.., at ....., demanded payment of the same from the defendant.]

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[1] Harpending v. Shoemaker, 37 Barb. 270.
[2] Gibson v. Stevens, 3 McLean, 551.
[3] Cates v. Phalen, 2 How. U. S. 376.
[4] Priest v. Price, 3 Keyes, 222.
[5] See Farron v. Sherwood, 17 N. Y. 227; see, also, Berry v. Fernandes, 1 Bing. 338.
[6] Allis v. Read, 45 N. Y. 142.

§ 870. **Essential Allegations—Demand—Request.**—The allegation of demand is not in general necessary, except for the purpose of fixing the time for interest thereon. An averment of request is necessary in a complaint for money paid.[1] But it may be either express or implied; and if implied, the facts raising it must be alleged.[2]

§ 871. **The Same—To be Repaid on a Specified Day.**

Form No. 214.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., he paid to the use of the defendant, and at his request, the sum of ....dollars, to one A. B., the amount of a promissory note made by the defendant.

II. That defendant promised to repay said sum, with interest, to this plaintiff, on the ..... day of ....., 18...

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 872. **Liability to Repay, how Created.**—The defendant's legal liability to pay the debt which the plaintiff has paid is an essential fact in an action to recover the money paid, unless there be an express promise by defendant to repay the plaintiff.[3] But a party who pays an illegal claim, without duress of person or of goods, or fraud on the part of the claimant, although he makes such payment under protest, can not maintain an action to recover back the money so paid.[4]

§ 873. **For Repayment of Money Paid on a Reversed Judgment.**

Form No. 215.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the ...., day of ....., 18... , judgment was rendered against this plaintiff in the superior court, county of ...., state of California, in an action wherein the defendant was plaintiff, and this plaintiff was defendant, for the sum of ..... dollars.

II. That on the ..... day of ..... 18 ..., at ....., the plaintiff paid to the defendant the sum of ..... dollars, in satisfaction thereof.

III. That afterwards, on the ..... day of ....., 18..., by the judgment of the supreme court of the state of California,

[1] 2 Greenl. Ev. 98.
[2] Durnford v. Messiter, 5 Man. & S. 446
[3] 2 Greenl. Ev. 103, sec. 114, note.
[4] Flower v. Lance, 59 N. Y. 603.

said first-mentioned judgment was reversed; but that no part of the said sum paid in satisfaction thereof has been repaid to this plaintiff.

[DEMAND OF JUDGMENT.]

§ 874. **Essential Allegations—When Action Lies.**—Money paid on a reversed or suspended judgment may be recovered back.[1] In such action it must be shown that the judgment was reversed; it can not be stated as erroneous.[2] The award of a *venire de novo*, to be issued by the court below, and an order that the costs of reversal abide the event of the suit, are no bar to the action to recover back the money paid.[3] An action lies to recover back money paid under the award of a public officer, when such award was obtained by fraud and imposition, and where the payment was made before discovering the fraud.[4]

§ 875 **By Broker, for Money Advanced on Account of his Principal.**

Form No. 216.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiffs are partners, doing business in the city of ..... as brokers, under the firm name of A. B. & Co.

II. That, as brokers, on or about the .... day of ....., 18 ...., they purchased for and on account of the defendant, and at his request, the following goods, wares, and merchandise [designate them], under an agreement that said goods, wares, and merchandise were to be paid for by the defendant at the expiration of ..... days from the day of purchase, with the right to the defendant to pay for said goods, wares, etc., at any time before the expiration of said ..... days.

III. That it is the custom of brokers in such cases to purchase the goods in their own names, without disclosing the name of their principal, and in case of the failure of the principal to pay for the same, to resell the goods on account of the principal.

IV. That on the ..... day of ....., 18 ..., at ....., plaintiffs offered to deliver said goods, wares, and merchandise to the defendant, and demanded of him payment for the same.

V. That on or about the ..... day of ....., 18..., the defendant paid to the plaintiffs, on account of the said purchase of goods, wares, etc., ... dollars.

[1] Baun v. Reynolds, 18 Cal. 276.

[2] Bank of Washington v. Bank of United States, 4 Cranch C. C. 86; compare McDaniel v. Riggs, 3 Id. 167; Bank of Washington v. Neale, 4 Id. 627; White v. Ward, 9 Johns. 232; Roth v. Schloss, 6 Barb. 308.

[3] Sturges v. Allis, 10 Wend. 355.

[4] Michigan v. Phœnix Bank, 33 N. Y. 9; modifying same case, 7 Bosw. 20.

VI. That at the expiration of the said ..... days, the defendant failed to pay the balance due for said goods, and the plaintiffs paid for the same, and to reimburse themselves, afterwards, on the ..... day of ...., 18.., sold the same on his account, at [state the price]. And that there is now due and unpaid, from the defendant to the plaintiff, on account thereof, the sum of ..... dollars, and interest thereon from the date last aforesaid.

[DEMAND OF JUDGMENT.]

§ 876. **Essential Allegations—Custom—Demand.**—It is well to set forth the custom of brokers in such transactions.[1] A custom of insurance brokers to take dividends declared by mutual companies in lieu of all other compensation, is bad.[2] The plaintiff must aver that he demanded payment of the price, and offered to deliver the goods.[3]

§ 877. **For Repayment of Deposit on Purchase of Real Estate.**

Form No. 217.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., the plaintiff and the defendant made their contract in writing, subscribed by them, whereby it was mutually agreed that the said defendant should sell to this plaintiff, and the plaintiff should buy from the defendant, certain real estate [describe it], for the sum of ..... dollars, to be paid by the plaintiff; that the defendant should make a good title to the said premises, and deliver a deed thereof on the ..... day of ....., 18..; and that the plaintiff should thereupon pay to the said defendants the said purchase money.

II. That the plaintiff, as a security, as well for the performance of said agreement on his part, as to secure a performance thereof on the part of the defendant, then and there deposited in the hands of said defendant the sum of .... dollars, as part of said purchase money, to be to and for the use of the defendant, and to be retained by him on account of the purchase money, if the plaintiff should complete his purchase and receive the deed; but to be to and for the use of the plaintiff, and to be returned to him, if the defendant should fail to fulfill his agreement, to give a deed at the time and pursuant to the agreement.

[1] Whitehouse v. Moore, 13 Abb. Pr. 142.
[2] Minnesota C. R. R. Co. v. Morgan, 52 Barb. 217.
[3] Merwin v. Hamilton, 6 Duer, 244.

III. That he has always been ready and willing to do and perform everything in the agreement contained on his part, and on the said.....day of....., 18..., was ready and willing, and offered to the defendant to accept the deed of the premises pursuant to the agreement, and to pay to him the balance of the purchase money due therefor.

IV. That the defendant did not on the said.....day of ....., 18....., nor at any time since, give him a deed of the premises pursuant to the agreement, but refused to do so.

V. That on the.....day of....., 18 ....., he demanded of the defendant payment of the sum of.....dollars, deposited with him as aforesaid.

VI. That defendant has not paid the same, nor any part thereof.

[Demand of Judgment.]

§ 878. **When Action Lies.**—Upon failure of the vendor to be ready with the deed, and convey a good title on the day agreed, the vendee may rescind the contract, and recover back the deposit;[1] and a demand of the deposit is a rescission.[2] And if on demand the vendor positively refuses, no further demand is necessary.[3] But if by the laches of the vendee the remedy at law is barred, and the right to a specific performance is forfeited, there can be no recovery of what has been paid on the contract.[4] Thus, upon a sale by auction, if the vendor fails to complete the contract, the deposit may be recovered from the auctioneer as stakeholder;[5] and if he fail to disclose his principal, he is liable for damages as well.[6] But where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and it afterwards transpires that such purchase avails the purchaser nothing, no right of legal complaint lies against the agent.[7] So, also, where a purchaser at a sale under a decree in foreclosure suit, which decree was void because grantee of the mortgagor was not made a party, an action will not lie to recover back the money paid them on his bid.[8] But where plaintiff bought a lot and paid taxes thereon, and afterwards discovered that the defendant had previously sold it, and the

[1] Judson v. Wass, 11 Johns. 525; Sugd. on Vendors, 359; Van Benthuysen v. Crapser, 8 Johns. 257; Dominick v. Sayre, 3 Sandf. 555.

[2] Id.

[3] Blood v. Goodrich, 9 Wend. 68.

[4] Finch v. Parker, 49 N. Y. 1.

[5] Lee v. Munn, 1 Moore, 481; Curling v. Shuttleworth, 6 Bing. 121.

[6] Hanson v. Robardeau, Peake's N. P. C. 163; Kent's Com. 630, 631; Mauri v. Heffernan, 13 Johns. 58; Bank of Rochester v. Monteath, 1 Den. 402; Mills v. Hunt, 20 Wend. 431.

[7] Engels v Heatly, 5 Cal. 125.

[8] Boggs v. Hargrave, 16 Cal. 559.

defendant knew of this former conveyance, and that the money was fraudulently obtained, the procurement by defendant of a full title to the lot will not bar the plaintiff's recovery of the purchase money and interest.[1] And where the sale of a city's property was without authority, the plaintiff is not required to surrender the property before bringing an action for recovery back of the purchase money.[2] He is not required to transfer either the property or the possession to the corporation before the commencement of the action.[3]

§ 879. **Essential Averments—Demand—Offer to Perform.**—To recover back purchase money on the ground of a breach of covenant, the complaint must allege a breach of covenant.[4] It is necessary for the plaintiff to aver his readiness and willingness to fulfill at the time and place agreed.[5] But the purchaser is not bound to make an absolute tender of performance; a conditional offer to perform is sufficient.[6] An offer to perform is necessary; mere readiness is not sufficient.[7] The bringing of the action is not, however, a sufficient demand. A conveyance should be demanded and refused, and a reasonable time allowed for its execution.[8]

§ 880. **Interest when Allowed.**—The plaintiff may recover interest on the deposit money recovered, from the time of demand;[9] and on money in his hands lying idle, ready to complete the contract.[10]

§ 881. **To Recover Back a Wager.**

Form No. 218.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff deposited in the hands of the defendant, as stakeholder, ... dollars, which was to abide the event of a wager made between the plaintiff and one A. B., on the result of [here state what, as election, race, or otherwise].

II. That such wager was in violation of the statute entitled

[1] Alvarez v. Brannan, 7 Cal. 503.

[2] McCracken v. San Francisco, 16 Cal. 591.

[3] Herzo v. San Francisco, 33 Cal. 134.

[4] Willis v. Primm, 21 Tex. 380.

[5] Porter v. Rose, 12 Johns. 209.

[6] Robb v. Montgomery, 20 Johns. 15; West v. Emmons, 5 Id. 179; Topping v. Root, 5 Cow. 404; Rawson v. Johnson, 1 East, 203; Bellinger v. Kitts, 6 Barb. 273.

[7] Lester v. Jewett, 11 N. Y. 453; Williams v. Healey, 3 Den. 363; Johnson v. Wygant, 11 Wend. 48.

[8] Fuller v. Hubbard, 6 Cow. 13; Hackett v. Huson, 3 Wend. 249; Foote v. West, 1 Den. 541; Lutweller v. Linnell, 12 Barb. 512. To the contrary are: Driggs v. Dwight, 17 Wend. 71; Flynn v. McKeon, 6 Duer. 203.

[9] Farquhar v. Farley, 7 Taunt. 592.

[10] Sherry v. Oke, 8 Dowl. Pr. C. 349.

"An act," etc. [title of act], passed ....., and the acts amendatory thereof and supplementary thereto.

III. That no decision has as yet been rendered upon said election [race or otherwise]; and that the defendant still retains said money as stakeholder.

IV. That on the ..... day of ....., 18.., the plaintiff demanded the return of said money of the defendant.

V. That the defendant has not returned or paid back the same.[1]

[Demand of Judgment.]

§ 882. **When Action Lies.**—At common law, a wager made in respect to matters not affecting the feelings, interest, or character of third persons, or the public peace, or good morals, or public policy, is valid, and can be enforced. In many of the states statutes have been passed for the discouragement of gaming, which gave a right of action for money lost at play or on a wager. In California, where an illegal wager is made, the parties to it may, before the wager is decided, recover their stakes from each other, or from the stakeholder. But after the money has been lost or won, and the result generally known, neither party can recover from each other, nor from the stakeholder, if he has paid over the money. In such state, betting on a horse-race is against public policy, and included within the foregoing rule.[2] There seems to be no satisfactory reason for the distinction, as made by the English cases, between actions directly between the parties to the wager and actions between the loser of a bet and the stakeholder, if one has been employed.[3] But where an act makes wagers on horse races and the holding of stakes criminal offenses, one who has deposited money with a stakeholder can not recover it, although the race has not come off.[4]

In Kansas, money placed in the hands of a stakeholder, on an illegal bet on elections, may be recovered by the depositor, on demand, at any time before it is paid over to the winning party.[5] In Michigan, money lost at play or on a horse-race, may be recovered as money had and received.[6]

§ 883. **Essential Allegations—Demand.**—An action to recover back money lost at play, is not an action for a penalty or

[1] For another form, consult O'Maley v. Reese, 6 Barb. 658; Betts v. Bache, 14 Abb. Pr. 279.

[2] Johnson v. Russell, 37 Cal. 672; Hil v Kidd, 43 Id. 615; Gridley v. Dorn, 57 Id. 78.

[3] Johnson v. Russell, 37 Cal. 670.

[4] Sutphin v. Crozier, 3 Vroom, 462; see Bybee, v. Burbank, 2 Oregon, 295;

[5] Reynolds v. McKinney, 4 Kans. 94; Jennings v. Reynolds, Id. 110.

[6] Grant v. Hamilton, 3 McLean, 100.

forfeiture.[1] The complaint in such action, if founded on statute, must be special, setting out the facts, and bringing the plaintiff within the statute by force of which he claims to recover.[2] The complaint is obnoxious to a motion that it be made more definite and certain, unless it states the facts necessary to show clearly under which section of the statute the action is brought.[3] As the remedy in such action is given by statute, the plaintiff must by his complaint bring himself within its provisions.[4] The count in a complaint stating that, on a day named, the defendant received a specified sum belonging to or on account of the plaintiff, and which is now due, being contrary to the provisions of the statute designating it, is not demurrable for not stating facts sufficient to constitute a cause of action.[5] An action against a stakeholder, to recover money deposited on an illegal wager, may be maintained without previous demand, when the money has been paid over before the action.[6] In such an action interest is recoverable from the time of demand, *e. g.*, from the commencement of the action.[7] In New York, in an action to recover money lost at play, since the statute gives the action only for losses exceeding twenty-five dollars at one sitting, and requires it to be brought within three months after payment, the defendant is entitled to require the plaintiff to specify in his complaint the amount lost at each sitting, and the time of payment. It is not sufficient that these facts might be called forth by requiring a bill of particulars.[8]

§ 884. **By Landlord, against Tenant, for Repayment of Tax.**

Form No. 219.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of....., 18..., at ....., the plaintiff and the defendant entered into an agreement, of which the following is a copy [set forth lease or agreement].

II. That there was duly levied and assessed upon said premises for the year 18..., and while the covenants of the aforesaid agreement were in full force, and the defendant in possession of the premises by virtue thereof, a tax of ..... dollars, which the defendant neglected to pay.

[1] Arrieta v. Morrissey, 1 Abb. Pr., N. S., 439.
[2] 15 Johns. 5; Moran v. Morrissey, 18 Abb. Pr. 131.
[3] Arrieta v. Morrissey, 1 Abb. Pr., N. S., 439.
[4] Longworthy v. Broomley, 29 How. Pr. 92.
[5] Betts v. Bache, 9 Bosw. 614.
[6] Ruckman v. Pitcher, 1 N. Y. 392.
[7] Ruckman v. Pitcher, 20 N. Y. 9; 13 Barb. 556.
[8] Arrieta v. Morrissey, 1 Abb. Pr., N. S., 439.

III. That by reason thereof, the plaintiff was, on the ..... day of ....., 18..., compelled to pay the said sum of .... dollars, with ..... dollars arrearages of interest, and ..... per cent, amounting in the whole to ..... dollars.

IV. That defendant has repaid no part thereof to plaintiff.

[DEMAND OF JUDGMENT.]

§ 885. **Demand.**—The lessor's right of action is perfect without a previous demand of the tenant.[1]

§ 886. **Illegal Taxes.**—In an action to recover back illegal taxes, it is not sufficient to aver that the valuation of the property is "unjust, disproportioned, and unequal." The complaint must state specifically wherein it is so.[2]

§ 887. **Against Carrier, to Recover Money in Excess for Freight.**

Form No. 220.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of....., 18..., at ....., the defendant agreed with the plaintiff to transport from ..... to ....., and to deliver to him certain goods of the plaintiff, for the sum of ..... dollars.

II. That the said sum of ..... dollars was a reasonable sum to be paid therefor.

III. That the defendants entered upon the performance of said agreement, and transported said goods.

IV. That on the arrival of said goods the plaintiff demanded said goods of the defendant, and was ready and willing, and offered to pay to the defendants for transporting the same, the said sum of ..... dollars.

V. That the defendant refused to deliver said goods to the plaintiff, unless he would pay to the defendant ..... dollars for transporting the same.

VI. That on the ..... day of ....., 18..., at ....., the plaintiff paid ..... dollars to the defendant to obtain delivery of said goods, which sum he paid under protest, and expressly denying the defendant's right to claim it, and otherwise performed all the conditions of said agreement on his part.

VII. That the defendant has not repaid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[1] Garner v. Hannah, 6 Duer, 262.

[2] Guy v. Washburn, 23 Cal. 111; 5 Hun, 421; Dewey v. Board of Sup. etc., 2 Id. 392. See also Dietrich v. Mayor of N. Y.,

§ 888. **Concurrent Acts.**—Delivery of freight by the carrier, and payment of freight money by the owners, are concurrent acts, and neither party is bound to perform his part of the shipping contract unless the other is ready to perform the correlative act.[1]

§ 889. **To Recover Back Freight on Failure of Carriage.**

Form No. 221.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant agreed with the plaintiff to transport from ..... to ....., and to deliver to him certain goods of the plaintiff, for the sum of ..... dollars.

II. That on the ..... day of ....., 18 .., the plaintiff paid to the defendant the sum of ..... dollars, as an advance payment for said transportation, and otherwise performed all the conditions of said agreement on his part.

III. That the defendant has not transported said goods, nor delivered the same to the plaintiff.

IV. That on the ..... day of ....., 18..., at ....., the plaintiff demanded of the defendant repayment of said sum of ..... dollars advanced.

V. That he has not repaid the same.

[DEMAND OF JUDGMENT.]

§ 890. **When Action Lies—In General.**—Where money is paid by one person, in consideration of an act to be done by another, and the act is not performed, the money so paid may be recovered back.[2] Contracts for carrying freight form no exception to the general law, that where money is paid for an act to be done by another, and the act is not done, the money may be recovered back.[3] Thus freight paid in advance for transportation of goods is to be repaid in the event of their not being carried, unless there be a special agreement to the contrary.[4] This rule is not subject to any usage to the contrary.[5] Advanced freight can be recovered back by the charterer, in case of the loss of the ship, or non-performance of the voyage, whether by fault of the master or not.[6]

[1] Frothingham v. Jenkins, 1 Cal. 43.
[2] Reina v. Cross, 6 Cal. 31; see Taylor v. Beavers, 4 E. D. Smith, 215.
[3] Reina v. Cross, 6 Cal. 29.
[4] Phelps v. Williamson, 5 Sandf. 578; Griggs v. Austin, 3 Pick. 20; Harris v. Hand, 4 N. H. 259, 555; 3 Kent's Com. 226.
[5] Emery v. Dunbar, 1 Daly, 408.
[6] Lawson v. Worms, 6 Cal. 305.

§ 891. **By Surety against Principal for Payment on Appeal Bond.**

Form No. 222.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the .... day of ....., 18..., at ....., a judgment was duly given and made in the ..... court of....., against the defendant, in favor of one ....., for ..... dollars, from which the said defendant appealed.

II. That on the .... day of ....., 18..., at the request of defendant, the plaintiff executed an undertaking, a copy of which is hereto annexed.

III. That on the .... day of ...., 18..., the said judgment was affirmed by the supreme court of this state, with ..... dollars costs and damages.

IV. That on the .... day of ....., 18..., the plaintiff paid ..... dollars, upon the said undertaking, to the said .....

V. That the defendant has not paid the same to plaintiff, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Copy of the undertaking.]

§ 892. **When action Lies—Essential Allegations.**—Unless there is a special promise, the defendant's legal liability to pay is an essential fact.[1] But in a suit by a surety against his principal to recover back money paid by him on a judgment against him for the debt of his principal, a transcript of the judgment need not be annexed to the complaint.[2] And where a defendant undertook to pay any judgment which M. might recover against L., and the plaintiff undertook to save him harmless from such payment to the extent of five hundred dollars, which sum he deposited with the defendant for that purpose, the relation of principal and surety did not exist between them. Under these circumstances, the deposit could not become the money of the defendant till he had paid the judgment, and the plaintiff is entitled to recover the money on the payment or release of the judgment.[3]

§ 893. **For Repayment of Advances on Services.**

Form No. 223.

[TITLE.]

The plaintiff complains, and alleges:

[1] 2 Greenl. Ev. 103.

[2] Harker v. Glidewell, 23 Ind. 219.

[3] Solomon v. Reese, 34 Cal. 85. The rights of sureties, as against principals and co-sureties, are discussed in 1 Pars. on Cont. 33; Pars. Mer. Law, 39; Baker v. Martin, 8 Barb. 634.

I. That on the ..... day of ....., 18.., at ....., the plaintiff and defendant entered into an agreement, whereby the plaintiff agreed to hire, and the defendant agreed to render his services to the plaintiff as ....., for the term of....., in consideration of the sum of..... dollars, to be paid therefor by the plaintiff.

II. That on the ..... day of ....., 18.., at ...., the plaintiff paid to the defendant as an advance for his services, to be rendered thereafter, in pursuance of said agreement, the sum of ..... dollars.

III. That the defendant wholly neglected and refused to render said services, although demanded by the plaintiff so to do.

IV. That the defendant has not repaid the same, nor any part thereof.

[Demand of Judgment.]

§ 894. **When Action Lies—Demand.**—The acceptance of an order to pay money, to be deducted from a payment to become due under a contract for work to be performed, is a promise to the payee, and the payee may recover thereon under the common money counts.[1] Where an agreement has been rescinded on a contract for services, or performance so neglected as to entitle the plaintiff to rescind, a demand is not necessary to enable the plaintiff to recover back advances.[2] If money has been paid or services rendered in the performance of the conditions of a void contract by one party thereto, and the other party fails to voluntarily perform on his part, the injured party has no remedy at law upon the contract. He may, however, under such circumstances, disaffirm such contract, and maintain his action at law to recover back money so paid, or the value of services so rendered.[3]

§ 895. **Sufficient Allegations.**—In a complaint for money expended and services performed, technical words, the meaning of which is long established, rather than phrases of doubtful import, should be used. The complaint ought to state that the money was expended for the use and benefit of defendant, and at his instance and request. So, in regard to the performance of labor.[4] The plaintiff must allege and prove non-performance.[5] And if the defendant has rescinded, plaintiff need not prove readiness to pay the whole contract price.[6]

[1] Quin v. Hanford, 1 Hill, 84; Weston v. Barker, 12 Johns. 278; 17 Wend. 206; McClellan v. Anthony, 1 Edm. 284.

[2] Raymond v. Bearnard, 12 Johns. 274; and see Utica Bank v. Van Gieson, 18 Id. 485.

[3] King v. Brown, 2 Hill, 485; Baldwin v. Palmer, 10 N. Y. 234; Fuller v. Reed, 38 Cal 99.

[4] Huguet v. Owen, 1 Nev. 464.

[5] Wheeler v. Board, 12 Johns. 363.

[6] Main v. King, 8 Barb. 535.

CHAPTER XII.

FOR SERVICES, WORK, AND LABOR.

§ 896. For Services at a Fixed Price.

Form No. 224.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ....., 18..., plaintiff rendered services to the defendant, at his special instance and request, in the capacity of [clerk or otherwise].

II. That for said services the defendant promised to pay plaintiff a salary at the rate of [fifteen dollars per week].

III. That the defendant has not paid the said salary [or that no part of said salary has been paid, except, etc.]

[DEMAND OF JUDGMENT.]

§ 897. When Action Lies.—The action for work, labor, and services lies upon the contract. If nothing remains to be done by the contractor but payment of the stipulated price, plaintiff may rest upon the duty raised by the law on the part of defendant to pay the price agreed, or he may plead the express agreement, and allege performance.[1] Or excuse for non-performance, and allege part performance,[2] if the contract has been abandoned by agreement, or rescinded by the wrongful act of a party, or its execution is incomplete by reason of an excuse.[3] Where, however, there has been a written contract, it must be produced on the trial, or its absence accounted for.[4] Where by the terms of a contract parties performing labor under it are to be paid at the end of each month, for the labor performed to that time, and they are not paid at the stipulated time, and are, by reason thereof, compelled to abandon the work, they have the right to do so, and are entitled to recover for the work done and not paid for, *pro tanto*, at the contract price.[5]

§ 898. The Same—Services of a Substitute.—The plaintiff may recover for work and services done by his substitute

[1] Farron v. Sherwood, 17 N. Y. 227.
[2] Wolfe v. Howes, 20 N. Y. 197.
[3] Farron v. Sherwood, 17 N. Y. 227; Wolfe v. Howes, 20 Id. 197.
[4] Clark v. Smith, 14 Johns. 326, and cases there cited; Champlin v. Butler, 18 Id. 169; Wood v. Edwards, 19 Id. 205; Smith v. Smith, 1 Sandf. 206; Ladue v. Seymour, 24 Wend. 60; Sherman v. N. Y. Central R. R., 22 Barb. 239; Adams v. The Mayor, 4 Duer, 295.
[5] Dobbins v. Higgins, 78 Ill. 440.

under a contract made by defendant with him, provided that the services of a particular person were not contracted for, and that no other person could, under the contract, fill the place of the employee.[1] Under a general complaint for work and labor, the plaintiff may recover on proof of a special contract fully completed.[2] Where there is a special contract between principal and agent, by which the entire compensation is regulated and made contingent, there can be no recovery on a count for a *quantum meruit*.[3]

§ 899. **Service for the Public.**—Where a service for the benefit of the public is required by law, and no provision for its payment is made, it must be regarded as gratuitous, and no claim for compensation can be enforced.[4]

§ 900. **Entire Contract.**—Where a person agrees to work for a certain period, at a certain price, or to perform certain services for such an amount, he can not break off at his own pleasure, and sue upon the contract for the work so far as he has gone.[5] In such a case, performance is a condition precedent to payment.[6] In a suit to recover for services for half a year, under a contract to work a whole year, plaintiff having quit, it requires slight evidence of assent or agreement to apportion the contract and allow plaintiff to recover.[7] A contract may be entire where payment is stipulated to be made monthly, where a note was to be given by the employer for the last four months' labor yet to be done, on a contract of eight months' duration.[8] Where one is employed by another under a contract, at a stated salary, payable monthly or at a stated time, as clerk or business agent, and the employee neglects his business, the employer is not precluded from suing for damages for neglect, by payment in full of employee's wages, or by not setting up a counter-claim in an action by employee for his wages.[9] Where a party contracts for a consideration in money to find a purchaser for certain lands, it is a contract of employment, and not a contract for the sale of land within the meaning of the statute of frauds.[10] But where a part of the remuneration was to be land, the contract was entire, and if void as to part under the statute of frauds, is void *in toto*, and could not

[1] Leet v. Wilson, 24 Cal. 398.
[2] Hurst v. Litchfield, 39 N. Y. 377.
[3] Marshall v. Baltimore and Ohio R. R. Co., 16 How. (U. S.) 314.
[4] Anderson v. Bd. Com., 25 Ohio St. 13.
[5] Hutchinson v. Wetmore, 2 Cal. 311.
[6] Hutchinson v. Wetmore, 2 Cal. 311.
[7] Hogan v. Titlow, 14 Cal. 255.
[8] Hutchinson v. Wetmore, 2 Cal. 311.
[9] Stoddard v. Treadwell, 26 Cal. 294.
[10] Heyn v. Philips, 37 Cal. 529.

be enforced.[1] But if services have been performed on such a void contract, the injured party may disaffirm the contract, and maintain his action at law for services rendered.[2]

§ 901. **Essential Allegations—Demand.**—A declaration for labor done or services performed generally, without specifying them in particular, is good.[3] And where a complaint for work, labor, and services, alleged an indebtedness in a sum certain therefor, but omitted to allege specially the value of the same or a promise to pay; and defendant, without demurring, put in an answer denying indebtedness, admitting services performed, and setting up payment in full, and there was a verdict for plaintiff; whatever the defects of the complaint may be, they were cured by defendant's pleading and by the verdict.[4] If the contract contains special provisions as to the mode of performance, the proper mode of declaring is still on the contract itself, and not on the general counts, setting it out at length, or in substance, with proper averments, to show that the conditions to the plaintiff's right of recovery have all been complied with.[5] No demand is necessary. Bringing the action is a sufficient demand on a contract to pay generally, and without time or terms specified. It is a debt payable when the services are performed, and no previous demand of payment is required.[6] An express agreement for extra pay must be shown where a party works for a monthly salary.[7]

§ 902. **Joint Services.**—Where two persons are employed by a claimant of a tract of land to procure a confirmation of the same, such service is not joint, and a separate action may be maintained by such agents for their expenses thus incurred.[8]

§ 903. **Jurisdiction.**—A British seaman on board a British vessel of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue for and recover his wages in a state court.[9]

[1] Crawford v. Morrell, 8 Johns. 255; Van Alstine v. Wimple, 5 Cow. 164.

[2] King v. Brown, 2 Hill, 485; Baldwin v. Palmer, 10 N. Y. 232; Fuller v. Reed, 38 Cal. 99.

[3] Edwards v. Nichols, 3 Day, 16; compare Willamette Falls Transportation Co. v. Smith, 1 Or. 171.

[4] McManus v. Ophir S. M. Co., 4 Nev. 15.

[5] Adams v. Mayor etc. of N. Y., 4 Duer, 295; Atkinson v. Collins, 30 Barb. 430; S. C., 9 Abb. Pr. 353; Brown v. Colie, 1 E. D. Smith, 265; Wyckoff v. Myers, 44 N. Y. 143.

[6] Lake Ontario R. R. Co. v. Mason, 16 N. Y. 451; Ernst v. Bartle, 1 Johns. Cas. 319.

[7] Cany v. Halleck, 9 Cal. 198.

[8] Conner v. Hutchinson, 12 Cal. 126.

[9] Pugh v. Gillam, 1 Cal. 485.

§ 904. For Services at a Reasonable Price.

Form No. 225.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ....., 18..., at ....., he [made sundry repairs on several articles of furniture] for the defendant, at his request.

II. That the said services were reasonably worth..... dollars.

III. That defendant has not paid the same [or that no part thereof has been paid, except, etc.]

[DEMAND OF JUDGMENT.]

§ 905. **When Action Lies—Allegations**—The general rule of law is, while a special contract remains open or unperformed, the party whose part of it has not been done can not sue in *indebitatus assumpsit*, to recover a compensation for what he has done, until the whole shall be completed. But the exceptions from that rule are cases in which something has been done under a special contract, but not in strict accordance with it; but if the other party derives any benefit from the labor done, the law implies a promise on his part to pay such a remuneration as the work is worth; and to recover it an action of *indebitatus assumpsit* is maintainable.[1] The services must have been rendered in pursuance of an agreement, express or implied, that they were to be paid for.[2] But a person enjoying the benefit of the services of another is presumed to be bound to pay therefor what they are reasonably worth.[3] But this presumption may be rebutted by proof of agreement at a fixed amount.[4] And where a hired person continues in employment after the term of the contract, the presumption is that the same wages are to be continued under the new employment, and the servant can not recover on a *quantum meruit*.[5] If the complaint alleges no special contract, plaintiff can recover only what his services are worth.[6] In an action on a *quantum meruit*, for services rendered, excuses for not performing the contract need not be set up.[7] The complaint in an action against a guardian, to recover from his ward's estate for services rendered them, must allege that the employment of the plaintiff

[1] Dermott v. Jones, 23 How. U. S. 220.
[2] Maltby v. Harwood, 12 Barb. 473; Livingston v. Ackeston, 5 Cow. 531; Williams v. Hutchinson, 3 N. Y. 312.
[3] Moulin v. Columbet, 22 Cal. 509.
[4] Id.
[5] Nicholson v. Patchin, 5 Cal. 475.
[6] Crole v. Thomas, 19 Mo. 70.
[7] Wolfe v. Howes, 20 N. Y. 197.

was a reasonable and proper expense incurred by the guardian.[1]

§ 906. **Services of Wife**—Proof that the plaintiff was wife of one of the parties defendant, defeats the implication of a contract as on a *quantum meruit*.[2]

§ 907. **Subsequent Promise.**—Where a promise to pay is made subsequent to the completion of the services, it must be shown that the services were rendered at the defendant's request.[3]

§ 908. **By Carriers, for Freight.**

Form No. 226.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., he transported [in his wagon], thirty tons of coal, from ....., to ....., for the defendant, and at his request.

II. That defendant promised to pay plaintiff the sum of ..... dollars per ton, as freight thereon [or that such transportation was reasonably worth ..... dollars].

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 909. **For Passage Money.**

Form No. 227.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., he conveyed defendant in his steamer, called the....., from ..... to ....., at his request.

II. That defendant promised to pay plaintiff ..... dollars therefor [or that said passage was reasonably worth ..... dollars].

III. That defendant has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 910. **By Parent, for Services of Minor Son.**

Form No. 228.

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. rendered services [as clerk] to the defendant, at his request, in his store at ....., from the..... day of ....., 18.., to the ..... day of..... ..... 18...

[1] Caldwell v. Young, 21 Tex. 800.
[2] Angulo v. Sunol, 14 Cal. 402.
[3] Bartholomew v. Jackson, 20 Johns. 28; Frear v. Hardenbergh, 5 Id. 272; Parker v. Crane, 6 Wend. 647; see also 1 Smith's Lead. Cas. H. & W. notes, 222; see also Hewett v. Bronson, 5 Daly (N. Y.) 1.

II. That such services were reasonably worth ..... dollars [or allege price agreed, as in preceding forms].

III. That the said A. B. was then, and is now, under twenty-one years of age, and the minor child of this plaintiff.

IV. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 911. **Interest of Parent.**—Legal interest vests in a parent for the work, labor, and services of his child, where there is no express agreement.[1] But under an express agreement, or where circumstances warrant the conclusion that it was understood that the child might receive his earnings, payment to such child will be good.[2] So where the father gives his implied consent.[3] So the father in the above instances can not sue for such services, even though he give notice not to pay said son his wages.[4] A father can not sue in his own name for money due his minor son, in consideration of his enlistment under a contract made with the father's consent.[5]

§ 912. **For Services and Materials, at a Fixed Price.**

Form No. 229

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ... ., 18..., at ....., he furnished the paint, and painted defendant's house, at his request.

II. That defendant promised to pay him ..... dollars therefor.

III. That he has not paid the same [or that no part of the same has been paid, except, etc.]

[DEMAND OF JUDGMENT.]

§ 913. **Demand—Cause of Action.**—In an action for services and materials furnished, where both items go to constitute a single cause of action, it must be made so to appear in the complaint. Bringing the action is sufficient demand.[6]

§ 914. **By an Attorney for Services.**

Form No. 230.

[TITLE.]

The plaintiff complains, and alleges:

[1] Shute v. Dorr, 5 Wend. 204.

[2] Id.; Benson v. Remington, 2 Mass. 115; McCoy v. Huffman, 8 Cow. 84.

[3] Whiting v. Earle, 3 Pick. 201; see Burlingame v. Burlingame, 7 Cow. 92; Keen v. Sprague, 3 Greenl. 77; Manchester v. Smith, 12 Pick. 115.

[4] Morse v. Welton, 6 Conn. 547; United States v. Mertz, 2 Watts, 403; Gale v. Parrott, 1 N. H. 28; Eubanks v. Peak, 2 Bailey, 497; Chase v. Smith, 5 Vt. 556.

[5] Mears v. Bickford, 55 Me. 528; see also Simpson v. Buck, 5 Lans. (N. Y.) 337.

[6] Feeter v. Heath, 11 Wend. 479.

I. That between the ..... day of ...., 18..., and the ..... day of ....., 18..., the plaintiff performed services for the defendant, at his request, in prosecuting and defending certain suits, and in drawing and engrossing various instruments in writing, and in counseling and advising the defendant, and in attending in and about the business of the defendant.

II. That said services were reasonably worth the sum of .... dollars.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 915. **When Action Lies—Allegations.**—In an action by an attorney for his fees it is necessary to aver and prove on the trial a retainer or employment of the plaintiff as attorney in the suit or business in which his services was rendered.[1] It is not necessary to show a written retainer, a parol employment will suffice; or the jury may infer a retainer from acts of the client, in the progress of the suit, amounting to a recognition of the attorney, or from his undertaking to pay for the services.[2] If the services were rendered as attorney of another person than the defendant, facts showing the defendant's liability therefor must be alleged.[3] A complaint for money expended and services performed should state, for the use and benefit of defendant, and at his instance and request. So in regard to performance of labor.[4] So a complaint which avers substantially that the defendant was, at a certain time, indebted to the plaintiff in a certain sum, for professional services rendered at the special instance and request of the defendant, is sufficient, without stating in terms the value of the services, or that the defendant promised to pay.[5]

§ 916. **Measure of Damages—Contingent Fee.**—To ascertain what may be a reasonable compensation for services rendered by an attorney, the amount involved and the character of the business transacted by him must be taken into account, and the time employed; not the time immediately devoted to the business alone, but the time which he must lose from other business in attending to it.[6] In addition to these, the jury should consider the character of the litigation in which the

[1] Hotchkiss v. Leroy, 9 Johns. 142; Burghart v. Gardner, 3 Barb. 64.

[2] Harper v. Williamson, 1 McCord, 156; Owen v. Ord, 3 Car. & P. 349; Wiggins v. Peppin, 3 Beav. 340; see also Allen v. Bane, 4 Id. 494.

[3] Merritt v. Millard, 5 Bosw. 645.

[4] Huguet v. Owen, 1 Nev. 464.

[5] Wilkins v. Stidger, 22 Cal. 232.

[6] Quint v. Ophir S. M. Co., 4 Nev. 304.

services were rendered; the novelty, difficulty, and importance of the questions involved; the value of the rights or property in controversy; the attorney's position in the case as leading or assistant counsel, and the degree of responsibility resting upon him; and the fact, if it be a fact, that compensation was wholly contingent upon success.[1] If the services were so contingent, the question when such success was obtained is a question of law.[2] And an instruction in a suit on a *quantum meruit*, to recover counsel fees, that "if plaintiffs' fee was to be contingent on success, and defendant settled the suit without plaintiffs' consent, plaintiffs could recover what their services were worth," does not incorrectly state the law.[3] And an instruction to the jury in a suit to recover counsel fees, that "if plaintiffs were employed by defendant to come from San Francisco to Virginia city, or from San Francisco to Aurora, and there was no special agreement as to the amount to be paid, they can only recover the value of the services rendered at the place where they were rendered, with the addition of reasonable traveling expenses; and if the traveling expenses were paid by defendant, then they can not be recovered by plaintiffs," was held clearly erroneous, and properly refused.[4]

§ 917. **For Services and Materials, at a Reasonable Price.**

Form No. 231.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., he built a house known as No. ....., ... street, in said city, and furnished the materials therefor, for the defendant, at his request.

II. That the said work and materials were reasonably worth ..... dollars.

III. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.]

§ 918. **By Advertising Agents, for Services and Disbursements.**

Form No. 232.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ..., 18..., at ...., the plaintiff rendered

[1] Leitensdorfer v. King, 3 West Coast Rep. 135.

[2] Leitensdorfer v. King, 3 West Coast Rep. 135.

[3] Quint v. Ophir S. M. Co., 4 Nev. 304.

[4] Quint v. Ophir S. M. Co., 4 Nev. 314.

services to the defendant, at his request, in causing the defendant's advertisements of his business to be inserted in the following named newspapers and periodicals [names of newspapers].

II. That the plaintiff paid out at the request of the defendant, for such insertions for the use of the defendant, and at his request.....dollars.

III. That the defendant promised to pay said amount, together with a reasonable sum for said services.

IV. That said services were reasonably worth.....dollars.

V. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 919. By Publisher and Proprietor for Advertising.

Form No. 233.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiffs, at the times hereinafter mentioned, were publishers and proprietors of the daily newspaper known as the "Mountain Avalanche," published at....., in the county of....., in this state.

II. That between the.....day of ....., 18....., and the .....day of....., 18....., the plaintiff published..... insertions in the said newspaper of the advertisements of the defendant at his request.

III. That such services and publication were reasonably worth .....dollars.

IV. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 920. For Stabling Horses.

Form No. 234.

[TITLE.]

The plaintiff complains, and alleges:

I. That, at the request of the defendant, he provided for, kept, and fed a horse of the defendant, from the .....day of ....., 18....., to the day of....., 18.....

II. That such keeping and finding of said horse was reasonably worth .....dollars.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 921. Special Contract, Completely Filled.

Form No. 235.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ..... 18.., at ....., the defendant made his agreement in writing under his hand and seal, of which the following is a copy [copy of agreement].

II. That the plaintiff has duly performed all the conditions thereof on his part.

III. That on the ..... day of ....., 18..., at ....., the plaintiff demanded of the defendant payment of the sum of ..... dollars, in said contract mentioned.

IV. That he has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 922. **Partnership.**—Where partners employed plaintiff on condition that a certain portion of his wages should be retained till a certain sum had accumulated, when plaintiff should become a partner, and during the accumulation the firm dissolved, the plaintiff may sue on the special contract or for work and labor.[1]

§ 923. **Performance.**—If the plaintiff undertakes to aver performance by setting out the facts showing performance, he may be held to aver them with certainty.[2]

§ 924. **The Same, where the Contract was Fulfilled by an Assignee.**

Form No. 236.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ..... defendants, in consideration of ....., executed and delivered in writing, under their hands and seals, a contract with one A. B., of which the following is a copy, and marked "Exhibit A."

II. That thereafter, and before the ..... day of ....., said A. B. duly assigned the same, and all his rights under it, to the plaintiff.

III. That up to the time of the assignment, the assignor had duly performed all the conditions of the contract on his part, and that since said assignment, the plaintiff duly performed all the conditions thereof on his part.

IV. That on the ..... day of ....., 18..., at ....., the plaintiff demanded of the defendant payment of the sum of ..... dollars, in said contract mentioned.

V. That he has not paid the same.

[DEMAND OF JUDGMENT]

[Annex copy of contract, marked "Exhibit A."]

[1] Adams v. Pugh, 7 Cal. 150.

[2] Hatch v. Peet, 23 Barb. 575. As to averment of performance on a modified contract, see Smith v. Brown, 17 Barb. 431.

] 925. **Performance, how Alleged.**—One suing on a contract assigned to him may allege performance by saying that up to the time of the assignment the assignor had performed, on his part, all the covenants of the contract, and that afterwards the plaintiff fully performed the conditions imposed by the contract on the assignor.[1] Where plaintiff has bound himself to procure certain acts to be done by third parties, adding that those on whose behalf he acted have also performed, is unnecessary.[2]

CHAPTER XIII.

FOR USE AND OCCUPATION.

§ 926. On an Express Contract.

Form No. 237.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff rented to the defendant, and the defendant hired from the plaintiff [the office No. ....., ... street], and agreed to pay therefore the monthly rent of ..... dollars, payable [monthly], on the first day of each [month].

II. That defendant occupied the said premises from the ..... day of ....., 18..., to the ..... day of ....., 18...

III. That defendant has not paid ..... dollars, being the [part of said] rent due on the ..... day of ....., 18...

[DEMAND OF JUDGMENT.]

§ 927. **Summary Proceedings to Recover Possession.**—It seems that where a landlord elects to terminate a lease for non-payment of rent, and commences summary proceedings to recover possession, he is not entitled to recover for use and occupation from the time he terminated the lease until he obtained possession.[3]

§ 928. **Occupancy.**—Actual continued occupancy is not necessary to be shown.[4]

[1] California Steam Navigation Co. v. Wright, 6 Cal. 258.

[2] Rowland v. Phalen, 1 Bosw. 43. For cases of services rendered to relatives, see Thornton v. Grange, 66 Barb. 507; and Neal v. Gilmore, 79 Pa. St. 421.

[3] Powers v. Witty, 42 How. Pr. 352; S. C., 4 Daly, 552.

[4] Little v. Martin, 3 Wend. 220; Westlake v. De Graw, 25 Id. 669; Hoffman v. Delihanty, 13 Abb. Pr. 388.

§ 929. For Rent Reserved in a Lease.

Form No. 238.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant entered into a covenant with plaintiff, under their hands and seals, a copy of which is annexed hereto, and made a part of this complaint, marked "Exhibit A" [or state the substance of the agreement].

II. That the defendant has not paid the rent for the month ending on the ..... day of ....., 18..., amounting to ..... dollars.

[DEMAND OF JUDGMENT.]

[Annex copy of lease, marked "Exhibit A."]

§ 930. **Parties.**—Where parties own tracts in severalty, they can not join in an action to recover for the use and occupation of the entire tract.[1]

§ 931. **Designation of Premises.**—The premises may be designated by a simple reference to the lease, as in the above form.[2]

§ 932. **Forfeiture.**—The tenant can not insist that his own act amounted to a forfeiture; if he could, the consequence would be that in every instance of an action of covenant for rent brought on a lease containing a provision that it should be void on the non-performance of the covenants, the landlord would be defeated by a tenant showing his own default at a prior period, which made the lease void.[3] At common law there was no forfeiture of an estate for years for the non-payment of rent.[4] By failure to pay rent when demanded, the contract under the lease is determined, and possession from that time is tortious.[5] But the mere failure to pay will not make a forfeiture; a formal demand on the day it becomes due is necessary.[6] Where the record shows no demand of rent, there can be no forfeiture.[7]

§ 933. **Liability of Tenant.**—The tenant is liable to payment until he has restored full and complete possession to the landlord, and his liability to pay the rent is not discharged by an eviction, unless under a title superior to the landlord's, or by some agency of the landlord's.[8]

[1] Tennant v. Pfister, 51 Cal. 511.

[2] Dundass v. Lord Wymouth, Cowp. 665; Van Rensselaer v. Bradley, 3 Den. 135.

[3] Doe d. Bryan v. Banks, 4 B. & Ald. 409; Stuyvesant v. Davis, 9 Paige Ch. 427; Camfield v. Westcott, 5 Cow. 270.

[4] Chipman v. Emeric, 3 Cal. 273.

[5] Treat v. Liddell, 10 Cal. 302.

[6] Gaskill v. Tranter, 3 Cal. 334.

[7] Chipman v. Emeric, 3 Cal. 273.

[8] Schilling v. Holmes, 23 Cal. 227.

§ 934. **Term of Lease.**—If the tenant takes a receipt from his landlord, specifying the amount of rent paid, and the length of the term, to commence on the expiration of the lease, the new term will be for the time specified in the receipt. No new tenancy by implication arises in such cases.[1] Where a landlord served upon his tenant, who was occupying under him certain premises, under a rent of two hundred and fifty dollars per month, a notice to quit, but before the time at which, by the effect of the notice, the tenancy would have terminated, the tenant, through a third person, proposed to the landlord to continue his occupancy, at a rent of three hundred dollars, with which proposal the landlord expressed himself satisfied, but did not in terms notify the tenant of his acceptance of it, and he continued to occupy the premises, it was held, in an action by the landlord for rent at the rate of three hundred dollars per month, that it must be inferred that the subsequent occupation of the tenant was with the consent of the landlord, on the basis of the proposal, rather than as a trespasser, and that plaintiff was entitled to recover.[2]

§ 935. **For Deficiency after a Re-entry.**

Form No. 239.

[TITLE.]

The plaintiff complains, and alleges:

I. That by a lease made between the plaintiff and the defendant, on the ....., day of ....., 18.., at ....., the defendant rented from the plaintiff, and the plaintiff demised and leased to the defendant, the premises therein mentioned, at the monthly rent of ..... dollars, gold coin, payable monthly in advance, on the ..... day of each and every month, and that said indenture contained a covenant of which the following is a copy [copy covenant].

II. The defendant, contrary to his covenant [state the breach], and that the plaintiff for that cause re-entered the premises, and took possession thereof by virtue of the authority given in said lease, and as agent of the defendant, and not otherwise, and that he made diligent efforts to relet the premises for the defendant, but was unable to do so.

III. That thereby the plaintiff lost the sum of ..... dollars for rent for the months of . ... and.....

[DEMAND OF JUDGMENT.]

§ 936. **Surrender of Premises.**—One of the most important duties of the tenant is to peaceably surrender the premises

[1] Blumenberg v. Myres, 82 Cal. 93. [2] Hoff v. Baum, 21 Cal. 120.

as soon as the tenancy has expired.[1] The surrender of a leasehold estate is the merger of the fee, but this will not defeat the rights of a third party intervening before the merger took effect.[2]

§ 937. **Waiver of Forfeiture.**—The subsequent receipt of the rent by the lessor is a waiver of the forfeiture unless the covenant has a continuing covenant, or the lessor was ignorant of the breach.[3] The forfeiture of a lease is not waived by the lessor allowing the tenant to hold over, without notice to quit, unless the circumstances show a new term created.[4]

§ 938. **Against Assignee of Lessee.**

Form No. 240.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., by a lease made between this plaintiff and one A. B., under the hand and seal of said A. B. [of which a copy is annexed], this plaintiff leased to said A. B., and said A. B. rented from the plaintiff, certain lands, to have and to hold to said A. B. and his assigns, from the ..... day of ....., 18..., for the term of ....., then next ensuing, for the [monthly] rent of ..... dollars, payable to this plaintiff on the [state days of payment], which rent said A. B. did thereby, for himself and his assigns, covenant to pay to the plaintiff accordingly.

II. That thereafter, and during said term, to wit, on the ..... day of ....., 18... [naming a day before breach], all the estate and interest of said A. B. in said term, by an assignment then by him made, became vested in the defendant, who thereupon entered into possession of the demised premises.

III. That during the time the defendant was so possessed of the premises, to wit, on the ..... day of ....., 18..., the sum of ..... dollars of said rent, for the month ending on that day [or otherwise], became due to the plaintiff from the defendant.

IV. That he has not paid the same or any part thereof.

[DEMAND OF JUDGMENT.]

§ 939. **Assignment.**—In such cases the assignment need not be more specifically alleged.[5]

§ 940. **Liability.**—The liability of an assignee is confined to the term during which he holds the premises, by himself, or

[1] Schilling v. Holmes, 23 Cal. 227.
[2] Gaskill v. Trainer, 3 Cal. 331.
[3] McGlynn v. Moore, 25 Cal. 384.
[4] Calderwood v. Brooks, 28 Cal. 151.
[5] Van Rensselaer v. Bradley, 3 Den. 135; Norton v. Vultee, 1 Hall, 427.

his immediate tenants.[1] The assignee of a lease may discharge himself from all liability under the covenants of a lease, by assigning over; and the assignment over may be to a beggar, a *feme covert*, or a person on the eve of quitting the country forever, providing the assignment be executed before his departure, and even though a premium is given as an inducement to accept the transfer.[2]

§ 941. **Non-Payment.**—It is sufficient to aver that the defendant has not paid the same.[3]

§ 942. **Grantee of Reversion against Lessee.**

Form No. 241.

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. was the owner in fee of certain premises [describe them], and on the ..... day of ....., 18..., by a lease made between him and the defendant, under the hand and seal of the defendant, a copy of which is annexed and made a part of this complaint, marked "Exhibit A," he leased to the defendant said premises, from the ..... day of ....., 18..., for the term of ..... then next ensuing, for the [monthly or yearly] rent of ..... dollars, payable to said A. B., his heirs and assigns, on the [state days of payment], which rent the defendant did thereby covenant to pay to said A. B., his heirs and assigns, accordingly.

II. That thereafter, on the ..... day of ....., 18..., at ....., said A. B., by his deed, under his hand and seal, sold and conveyed to this plaintiff the demised premises.

III. That notice thereof was given to this defendant.

IV. That thereafter, to wit, on the ..... day of ....., 18..., the sum of ..... dollars of said rent, for the quarter ending on that day [or otherwise], became due to the plaintiff from the defendant.

V. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 943. **Allegation of Assignment.**

Form No. 242.

That on the ..... day of ....., at ....., the said A. B., assigned to the plaintiff said lease and covenants, and all his right to the rent therein secured.

[1] Astor v. L'Amoreux, 4 Sandf. 524. As to the liability of one in possession without a valid assignment, see Carter v. Hammett, 12 Barb. 253; Ryerss v. Farwell, 9 Id. 615.

[2] Johnson v. Sherman, 15 Cal. 287; citing 2 Platt on Leases, 416.

[3] Dubois, Ex'rs of, v. Van Orden, 6 Johns. 105; Van Rensselaer v. Bradley, 8 Den. 135; Holsman v. De Gray, 6 Abb. Pr. 79.

§ 944. Allegation by Heir of Reversioner.

Form No. 243.

That the said A. B. was on the ..... day of .... 18..., seised of the reversion in said demised premises. That afterwards, and during the said term, on the ..... day of ....., 18..., A. B. died so seised; whereupon the said reversion then descended to the plaintiff as his son and heir, and thereby plaintiff then became seised thereof in fee.

§ 945. **Assignments.**—In these actions, the complaint should specifically allege the assignments to the grantee, and the better plan is to annex a copy or copies (if there be several) to the complaint.[1] It should be alleged distinctly that there was a lease, that the defendant was lessee, and is sued for the rent.[2]

§ 946. Assignee of Devisee against Assignee of Lessee.

Form No. 244.

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. was in his life-time the owner in fee of certain premises [describe them], and that on the ..... day of ...., 18..., he leased the same to one C. D., by his lease dated on that day, a copy of which is hereto annexed as part of this complaint, and marked "Exhibit A."

II. That by virtue thereof the said C. D. entered into the possession of the demised premises.

III. That on the ..... day of ....., 18..., at ....., the said C. D. assigned all his right, title, and interest in the demised premises to the defendant.

IV. That on the ..... day of ....., 18..., at ....., the said A. B. died.

V. That by his last will and testament which was proved and admitted to probate before the probate court of the county of ....., in this state, on the ..... day of ....., 18..., the said A. B. devised the reversion and rent to one E. F.

VI. That on the ..... day of ....., 18..., at ....., the said E. F. assigned the said reversion and rent to the plaintiff.

VII. That after the said E. F. so assigned the said reversion and rent to the plaintiff, the sum of .... dollars accrued as the rent of said premises for the [month or quarter] ending on the ..... day of ....., 18..., under and according to the terms of said lease.

[1] Beardsley v. Knight, 4 Vt. 471. [2] Willard v. Tillman, 2 Hill, 274.

VIII. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.]

[Annex copy of lease, marked "Exhibit A."]

§ 947. **Executor and Devisee.**—One who is both executor and devisee of the lessor may join a claim for rent subsequent to the decease of testator with a claim for damages for breach of covenant respecting personal property embraced in the lease.[2]

§ 948. **For Use and Occupation of Pasture.**

Form No 245.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the .....day of ....., 18..., at..... the defendant hired from the plaintiff, and the plaintiff rented to the defendant, the vacant lot of land [describe it], at the rent of .....dollars per month, payable in gold coin, monthly [or otherwise], on the first day of each month.

II. That defendant occupied said lot by permission of the plaintiff, and as his tenant, under said agreement, for the grazing of his sheep [or cattle], from the ..... day of....., 18..., to the ..... day of....., 18...

III. That the defendant has not paid the rent for the months of..... and.....

[DEMAND OF JUDGMENT.]

§ 949. **Request and Permission.**—The allegation that the use and occupation of the lot in question was at the request of defendant, and by the permission of plaintiff, is the allegation of a contract, which the plaintiff is bound to establish to enable him to succeed.[3]

§ 950. **Terms Stated.**—If a plaintiff in an action on a contract for the pasturage of cattle at a fixed price, does not insert in his complaint any *quantum valebat* count, judgment must be for the stipulated sum, or for the defendant.[4]

§ 951. **For Use and Occupation—Implied Contract.**

Form No. 246.

[TITLE.]

The plaintiff complains, and alleges:

I. That defendant occupied the [stable or dwelling house, No. 47..... street], by permission of the plaintiff, from the ..... day of....., 18..., until the..... day of....., 18....

[1] It is not expected that this form will be of special use to the profession in California, but instances may present themselves where it may be of utility, and it is therefore inserted.

[2] Armstrong v. Hall, 17 How. Pr. 76.

[3] Sampson v. Schaeffer, 3 Cal. 201.

[4] Seale v. Emerson, 25 Cal. 293.

II. That the use of the said premises for the said period was reasonably worth ..... dollars.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 952 **When Action Lies.**—No action for use and occupation will lie where possession is adverse and tortious, for there can be no implication of a contract.[1] The right to recover for use and occupation is founded alone upon contract.[2] Or an agreement by which the tenant, with permission of the owner, occupied the premises.[3] But in certain cases a contract may be implied.[4] And in an action for use and occupation upon an understanding on appeal, the defendants are estopped from denying that the defendant in the judgment was in possession at the time he took his appeal and gave the undertaking.[5] If the occupation was contrary to the owner's will, his action must be for damages.[6] If the complaint shows that the occupation was a trespass, it is of course bad on demurrer.[7]

§ 953. **Essential Allegations—Title—Indebtedness.**—The plaintiff need not set forth an implied demise, but may declare for use and occupation, and recover on the special facts shown.[8] No tenancy can be implied under a party who has not the legal estate.[9] But it would appear that one occupying and paying rent to an apparent proprietor as his landlord, can not, when sued, allege that he has only the equitable estate.[10] An averment of use and occupation as tenant is a sufficient averment of indebtedness.[11] The plaintiff must show that the defendant used and occupied the premises by the permission of the plaintiff.[12] It seems that in this action plaintiff need not aver title, and the defendant can not object to his title.[13]

§ 954. **Parties.**—The grantee of demised premises, on the reversion thereof, is the proper party to bring suit for the recovery of rent which accrued and became due before, and, *a fortiori*, after the conveyance to him. After such conveyance an

[1] Sampson v. Schaeffer, 3 Cal. 196; Ramirez v. Murray, 5 Cal. 222.

[2] O'Connor v. Corbett, 3 Cal. 370; Espy v. Fanton, 5 Or. 423; Lankford v. Green, 52 Ala. 103.

[3] Atkins v. Humphrey et als., 52 Eng. Com. L. 653; Selby v. Browne, 7 Q. B. 620; 63 Eng. Com. L. 620.

[4] Osgood v. Dewey, 13 Johns. 240; Abeel v. Radcliff, Id. 297; Porter v. Bleiler, 17 Barb. 149; Ryerss v. Farwell, 9 Id. 615.

[5] Murdock v. Brooks, 38 Cal. 596.

[6] Smith v. Stewart, 6 Johns. 46; Bancroft v. Wardwell, 13 Id. 489; Hall v. Southmayd, 15 Barb. 32.

[7] Hurd v. Miller, 2 Hilt. 540.

[8] Morris v. Niles, 12 Abb. Pr. 103; Waters v. Clark, 22 How. Pr. 104.

[9] Morgell v. Paul, 2 Man. & R 303.

[10] Dolby v. Iles, 11 Ad. & E. 335.

[11] Walker v. Mauro, 18 Mo. 564.

[12] Sampson v. Schaeffer, 3 Cal. 196; Hathaway v. Ryan, 35 Id. 188.

[13] Vernan v. Smith, 15 N. Y. 329.

action by the grantor for rent can not be sustained.[1] Tenants in common may join in an action for use and occupation without showing a joint demise.[2] So, in England, an infant can also maintain this action, although he has a general guardian.[3]

§ 955. **Separate Demands.**—In New York, in an action for use and occupation, demands for rent which accrued in the life-time of a decedent, and for rent accruing after his decease, while the tenancy was continued by the executors on account of the estate, are properly joined as one cause of action, against the executors as such.[4]

§ 956. **Tenant at Will.**—If a party enters upon land which he has contracted to purchase, with the consent of the vendor, and the contract falls through because the purchaser fails to pay as agreed, the vendor may treat him as a tenant at will, and may bring *assumpsit* for use and occupation, or it seems he may maintain trespass.[5] After the determination of a tenancy at will by notice, *assumpsit* for use and occupation lies against the tenant, if he holds over.[6]

§ 957. **Interest.**—Interest may be recovered on a claim for use and occupation, after demand.[7]

§ 958. **Improvements.**—A defendant who entered under a bond for a deed from the plaintiff, can not set off his improvements against the damages for use and occupation.[8]

§ 959. **For Lodging and Board.**

Form No. 247.

[Title.]

The plaintiff complains, and alleges:

I. That from the ..... day of ....., 18..., until the ..... day of ...., 18..., defendant occupied certain rooms in the house [No. 54 ..... street, city of .....] by permission of the plaintiff, and was furnished by the plaintiff, at his request, with food, attendance, and other necessaries.

II. That in consideration thereof the defendant promised to pay [or the same was reasonably worth] the sum of ..... dollars.

III. That the defendant has not paid the same, nor any part thereof.

[Demand of Judgment.]

[1] Anderson v. Treadwell, 1 Edm. 201.

[2] Porter v. Bleiler, 17 Barb. 149; [3] Porter v. Bleiler, 17 Barb. 149; and see Fitzmaurice v. Waugh, 3 Dowl. & R. 273; 16 Eng. Com. L. R. 169.

[4] Pugsley v. Aiken, 11 N. Y. 494.

[5] Woodbury v. Woodbury, 47 N. H. 11; Jones v. Nathrop, 1 West Coast Rep. 279.

[6] Hogsett v. Ellis, 17 Mich. 351; 3 Am. Law. Rev. 757, 758.

[7] Ten Eyck v. Houghtaling, 12 How. Pr. 523.

[8] Kilburn v. Ritchie, 2 Cal. 146.

§ 960. **Allegation for Lodging.**

Form No. 248.

That the defendant occupied rooms in, and part of the house of the plaintiff, at ..... [and if furnished, add, together with furniture, linen and other household necessaries of the plaintiff which were therein], by the plaintiff's permission, as his tenant, from, etc.

§ 961. **For the Hire of Personal Property.**

Form No. 249.

[TITLE]

The plaintiff complains, and alleges:

I. That between the ..... day of ....., 18..., and the ..... day of ....., 18..., the defendant hired from the plaintiff [horses, carriages, etc.], for which he promised to pay the plaintiff, on account thereof, the sum of..... dollars on the ..... day of ....., 18..

II. That the defendant has not paid the same [or that no part of the same has been paid except the sum of, etc.]

[DEMAND OF JUDGMENT.]

§ 962. **Essential Allegations.**—Facts on which the amount of compensation depends must be set forth.[1] The word "hired" implies a request.[2]

§ 963. **Hire of a Piano-forte, with Damages for not Returning it**

Form No. 250.

[TITLE.]

The plaintiff complains, and alleges:

First.—For a first cause of action:

I. That on the ..... day of ....., 18..., at ....., the defendant hired from the plaintiff one piano-forte, the property of the plaintiff, for the space of [six] months, then next ensuing, to be returned to this plaintiff at the expiration of said time in good condition, reasonable wear excepted, for the use of which he promised to pay this plaintiff a reasonable sum [or state how much].

II. That ..... dollars was a reasonable sum for the hire of the same.

III. That he has not paid the same.

Second.—And for a second cause of action:

I. That the value of the piano-forte so hired by the defendant, as above alleged, was ..... dollars, and that the defendant in violation of his ageeement, has not returned the same, although he was, on the ..... day of ..... 18...,

[1] Relyea v. Drew, 1 Den. 561. [2] Emery v. Fell, 2 T. R. 28.

at ....., requested by the plaintiff so to do; to the damage of the plaintiff ..... dollars.

[DEMAND OF JUDGMENT.]

§ 964. **Hire of Furniture, etc., with Damages for Ill-use.**

Form No. 251.

[TITLE.]

The plaintiff complains, and alleges:

First.—For a first cause of action:

I. That on the ..... day of ....., 18 ..., at ....., the plaintiff rented to the defendant, and the defendant hired from the plaintiff, household furniture, plate, pictures, and books, the property of the plaintiff, to wit [describe the articles], for the space of ..... then next ensuing, to be returned by him to the plaintiff at the expiration of said time, in good condition, reasonable wear and tear thereof excepted.

II. That he promised to pay the plaintiff for the use thereof ..... dollars [in equal quarterly payments, on the ..... days of .....thereafter].

III. That no part thereof has been paid.

Second.—For a second cause of action:

[Allege as in preceding form to II.]

II. The plaintiff further alleges that the value of the property so hired by the defendant, as above alleged, was ..... dollars.

III. That the defendant, in violation of his said agreement to return the same in good condition, neglected the same, and through his negligence, carelessness, and ill-use the same became broken, defaced, and injured beyond the reasonable wear thereof, and in that condition were returned to the plaintiff, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

SUBDIVISION THIRD.

UPON WRITTEN INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY.

CHAPTER I.

NEGOTIABLE PAPER, BONDS, ETC.

§ 965. **Against Maker.**

Form No. 852.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, in consideration of ....., made, executed, and delivered to the plaintiff a certain instrument in writing of which a copy is hereto annexed and made a part hereof [or an instrument in writing in the words and figures following, to wit].

II. That by the terms of said written instrument, the defendant became indebted to the plaintiff in the sum of ... . dollars.

III. That the plaintiff has duly performed all the conditions thereof on his part.

IV. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 966. **Altered Instrument—Onus Probandi**—A party who claims under an instrument which appears upon its face to have been altered, is bound to explain the alteration. But not so, when the alteration is averred by the opposite party, and it does not appear upon the face of the instrument.[1] The alteration of the number of a state bond, payable to bearer, and not required by law to be numbered, is immaterial, and though made with fraudulent intent, does not avoid it in the hands of a subsequent *bona fide* holder for value without notice.[2] In California, the code provides that the party producing a writing as genuine which has been altered, or appears to have been

[1] United States v. Linn, 1 How. U. S. 104.
[2] Commonwealth v. Emigrant Industrial Savings Bank, 98 Mass. 12.

altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise.[1]

§ 967. **Consideration, when and how must be Alleged.** Where a copy of the instrument declared on is set out in the complaint, and it purports to be for value received, that is a sufficient allegation of a consideration.[2] In California, a written instrument is presumptive evidence of a consideration.[3] In declaring upon such instrument, it may be unnecessary to aver a consideration if the instrument set out expresses one; but if none is expressed on the face of the instrument, it is; and it is the better practice in all cases unless upon negotiable instruments. Where the instrument neither expresses a consideration nor, as in the case of a sealed instrument or negotiable paper, imports one, a consideration should be averred.[4] Where the instrument requires a consideration to support it, the consideration must be averred in the complaint.[5] In an action on a written instrument, it is not necessary to set out the consideration.[6] In Iowa and Indiana, an agreement in writing imports a consideration.[7] In a sealed instrument, the seal imports consideration.[8] So, in an undertaking to answer for the debt of another.[9]

§ 968. **Construction.**—In construing written instruments, the circumstances under which they were written, and the subsequent conduct of the parties, may be consulted.[10] Under the code, the recitals of an instrument averred in a complaint to have been executed by the defendant, have the same effect as specific averments of the truth of the facts recited.[11] When the plaintiff sets out in his complaint the contract sued on in the terms in which it is written, and then puts a false construction on its terms, the allegation repugnant to its terms

[1] California Code Civil Proc., sec. 1982.
[2] Jerome v. Whitney, 7 Johns. 321; Walrad v. Petrie, 4 Wend. 575; Prindle v. Caruthers, 15 N. Y. 425.
[3] Civil Code, sec. 1614.
[4] Spear v. Downing, 12 Abb. Pr. 437.
[5] Prindle v. Caruthers, 10 How. Pr. 33; Joseph v. Holt, 37 Cal. 250.
[6] Sloan v. Gibson, 4 Mo. 32; Caples v. Branham, 20 Id. 244.
[7] Tousley v. Olds, 6 Clark, 526.
[8] McCarty v. Beach, 10 Cal. 461; Willis v. Kempt, 17 Id. 98; Clark v. Thorpe, 2 Bosw. 680.
[9] Bush v. Stevens, 24 Wend. 256.
[10] McNeil v. Shirley, 33 Cal. 202.
[11] Slack v. Heath, 1 Abb. Pr. 331.

should be regarded as surplusage;[1] and where a declaration contains an averment of a fact *dehors* the written contract, which is in itself immaterial, the party making such averment is not bound to prove it.[2] In Massachusetts, where a written agreement has been executed by one person only, by which he agreed to deliver to another, upon the formation of a coal company, and when the certificate should have been issued, a certain amount of the stock of the company, and the agreement recites that the person who was to receive the stock agreed, in consideration thereof, to sell a certain amount of the stock of the company at a specified valuation, and collect payment therefor, a declaration in an action against the signer of the agreement is demurrable, which does not allege that there was a consideration for the defendant's promise, or that the company has been formed, the certificates issued, or the specified amount of stock sold, and payment therefor collected by the plaintiff.[3]

All the terms of the promise, including the kind of money in which the payment is to be made, are to be ascertained by an inspection and construction of the instrument.[4]

§ 969. **Date of an Instrument.**—In pleading a written instrument, *e. g.*, a release, if the only materiality of the date is that it was after another event, it is sufficient to say that it was so.[5]

§ 970. **Delivery.**—A delivery of a deed need not be stated in a pleading, and it may be stated to have been made on a day other than its date. Time need not be averred, unless it be the essence of the contract.[6] That an instrument was executed, imports a delivery.[7] The delivery of a promissory note is sufficiently averred by implication, and indorsement is unnecessary to transfer the title.[8]

§ 971. **Executed Implies Subscribed.**—An averment that an agreement was "executed," amounts to an averment that it was "subscribed" by the party to be charged.[9] If, in pleading a deed executed by a married woman, the pleader states that it was executed by attorney, he must also state the facts which

[1] Love v. S. N. L. W. & M. Co., 82 Cal. 639; Stoddard v. Treadwell, 26 Id. 300.
[2] Wilson v. Codman's Executors, 3 Cranch, 193.
[3] Murdock v. Caldwell, 8 Allen (Mass.), 309.
[4] Burnett v. Stearns, 33 Cal. 468.
[5] Kellogg v. Baker, 15 Abb. Pr. 286.
[6] Cro. Eliz. 178; Ashmore v. Rypley, Cro. Jac. 420; Moore v. Jones, 2 Ld. Raym. 1538; Tompkins v. Corwin, 9 Cow. 255; Brinkerhoff v. Lawrence, 2 Sandf. Ch. 400.
[7] Brinkerhoff v. Lawrence, 2 Sandf. Ch. 400.
[8] Perdy v. Vermilyea, 8 N. Y. 346.
[9] Cheney v. Cook, 7 Wis. 413.

make the case one in which such mode of execution is valid, or his pleading is demurrable.[1]

§ 972. **Foreign Language.**—If the instrument is in a foreign language, it is sufficient on demurrer to set forth in that language.[2] But it is better to plead it according to its legal effect.

§ 973. **Genuineness Deemed Admitted.**—When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified.[3] This section extends only to those parties who are alleged to have "signed" the instrument.[4] Therefore if the action is against an administrator, the genuineness of the signature must be proved.[5] So proceedings which are void by reason of the infirmity of the statute under which they are had, are not cured by an averment in a complaint that they were duly and legally had; and a failure to deny the averment in the answer is not an admission that the proceedings were valid or legal.[6]

§ 974. **Identity.**—Where the note was made payable to G. W., and the plaintiff named himself as Gilbert W., it was held that he should be presumed the same person.[7] Where the note was signed in the name of one of the partnership "& Co.," and in the action the defendants were named individually, it was held sufficient.[8]

§ 975. **Indebtedness of Defendant.**—If a complaint should only allege that defendant was indebted to plaintiff in a named sum, which defendant refused to pay, it would be insufficient. It must allege the facts which constitute the indebtedness.[9]

§ 976. **Indorsement of Sealed Instrument.**—*Assumpsit* may be brought on the unsealed indorsement of a sealed writing.[10]

§ 977. **Interest of Parties.**—Where the covenant purported to be made between two persons by name, of the first part, and the corporate company, of the second part, and only one of the persons of the first part signed the instrument, and the covenant ran between the party of the first part and the party of the second part, it was proper for the person who had signed on the

[1] Johnston v. Taylor, 15 Abb. Pr. 339.
[2] Nourny v. Dubosty, 12 Abb. Pr. 128.
[3] California Code C. P., sec. 447.
[4] Heath v. Lent, 1 Cal. 411.
[5] Id.
[6] People v. Hastings, 29 Cal. 449.
[7] Marshall v. Rockwood, 12 How. Pr. 452.
[8] Butchers' and Drovers' Bank v. Jacobson, 15 Abb. Pr. 218; S. C., 24 How. Pr. 204.
[9] Piercy v. Sabin, 10 Cal. 28.
[10] Campbell v. Jordan, Hemp. 534.

first part to sue alone; because the covenant inured to the benefit of those who were parties to it.[1]

§ 978. **Issue of Warrant.**—Averring the issue of a warrant imports a seal, if the case is one in which a seal is necessary.[2]

§ 979. **Lost Instrument.**—A party need not plead loss of an instrument, unless it be a negotiable instrument properly indorsed.[3] A motion to make a pleading more definite and certain, by setting forth the contents of a written instrument relied on by the pleader, should not prevail where it appears that the instrument is lost, and the pleading apprises the adverse party of the nature and effect of the instrument.[4]

§ 980. **New Promise, when to be Alleged.**—In California in actions upon written instruments for the payment of money, as promissory notes, the date, being shown, shows the period when the right of action accrues. In such cases, any new promise which has been made, renewing or continuing the contract, should be alleged.[5] In Ohio, this provision under the statute extends to accounts and other instruments "for the unconditional payment of money only." But a judgment can not be so pleaded.[6]

§ 681. **Promissory Notes.**—When a copy of the promissory note is annexed and the answer is not verified, the due execution and genuineness of the note is admitted.[7] So of a bond. And if the complaint contains a copy of the written instrument sued on, and is not verified, and the answer denies its execution but is not sworn to, the note is admissible in evidence without proof of the genuineness of the signature.[8]

§ 982. **Written Instruments, how Proved.**—An instrument in writing, executed and attested by a subscribing witness in a foreign country, or beyond the jurisdiction of the court, can be proved by evidence of the handwriting of the party who executed it.[9] The intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties admit the real facts of the transaction in their pleadings, these admissions are to be taken as modifications of the instrument,[10] as no proof is required of facts admitted or not denied.[11]

[1] Phil. W. &B. R. R. Co. v. Howard, 13 How. (U. S.) 308.
[2] Beekman v. Traver, 20 Wend. 67.
[3] McClusky v. Gerhauser, 2 Nev. 47.
[4] Kellogg v. Baker, 15 Abb. Pr. 286.
[5] Smith v. Richmond, 19 Cal. 481.
[6] Memphis Med. College v. Newton, 2 Handy, 163.
[7] Burnett v. Stearns, 33 Cal. 468; Horn v. Volcano Wat. Co., 13 Id. 62; Kinney v. Osborne, 14 Id. 112.
[8] Corcoran v. Doll, 32 Cal. 83; Horn v. Volcano Wat. Co., 13 Id. 62; Sacramento County v. Bird, Id. 66; Burnett v. Stearns, 33 Id. 468.
[9] McMinn v. Whelan, 27 Cal. 300.
[10] Lee v. Evans, 8 Cal. 424.
[11] Patterson v. Ely, 19 Cal. 28; Landers v. Bolton, 26 Id. 416.

Where a written instrument is made part of the complaint with both the first and second counts, and in the second count is referred to as already on file with the former, the latter will be sufficient.[1] The legal effect of written documents offered in evidence is a question for the court and not for the jury.[2]

§ 983. **Sealed Contract—Allegations in Actions on.**—Where the sealing of an instrument is sufficient according to the laws of a state in which it was made, the remedy upon it in a state in which such mode of sealing is not sufficient, must be according to the law of the latter state, instead of the former. Thus, in New York, an action on a deed sealed with a scroll, must be an action appropriate to unsealed instruments.[3] An impression of the seal of a corporation stamped upon the paper on which a mortgage of the corporation is written, is a good seal, although no adhesive substance is used.[4] In declaring on a specialty, it must be averred that it was sealed by the defendant. Setting it forth, with its conclusion, that it was signed and sealed with the name of the defendant and with an L. S., is not sufficient;[5] although "indenture" "deed," "writing obligatory," were held to import a seal.[6] The delivery of a specialty, though essential to its validity, need not be stated in a pleading. It is enough to allege that it was made by the defendant, as that implies delivery.[7] Where the law requires an instrument to be under seal to authorize a particular remedy thereon, it is necessary to state that it is under seal. But where it is wholly immaterial whether the instrument was or was not under seal, an averment that it was in writing is supported by the production of a written instrument, either with or without a seal attached.[8] In California all distinctions between sealed and unsealed instruments are abolished.[9]

§ 984. **Subscription by Agent.**—The word "agent," appended to the signature of the agent, is not mere *descriptio personæ*. It is the designation of the capacity in which he

[1] Peck v. Hensley, 21 Ind. 344.
[2] Carpenter v. Thurston, 24 Cal. 268.
[3] Warren v. Lynch, 5 Johns. 239; Van Santwood v. Sandford, 12 Id 198; Coit v. Milliken, 1 Den. 376; Andrews v. Herriot, 4 Cow. 508; 4 Kent. 451; U. S. Bank v. Donnally, 8 Pet. 362; Story's Confl. of L. 47; Thrasher v. Everett, 3 Gill & J. 234; Douglass v. Oldham, 6 N. H 150.
[4] Hendee v. Pinkerton, 14 Allen (Mass.). 381.
[5] Cabell v. Vaughan, 1 Saund. 291; 1 Ch. Pl. 109; Van Santwood v. Sandford, 12 Johns. 197; Macomb v. Thompson, 14 Id. 207. To much the same effect: Staunton v. Camp. 4 Barb. 274.
[6] Cabell v. Vaughan, 1 Saund. 291, Phillips v. Clift, 4 Hurlst. & N. 168.
[7] 1 Ch. Pl. 348; Cabell v. Vaughan, 1 Saund. 291; Marshall v. Rockwood, 12 How. Pr. 452; Lafayette Insurance Co. v. Rogers, 30 Barb 491.
[8] Jenkins v. Pell. 20 Wend. 450.
[9] Civil Code, sec. 1629.

acted.[1] Where a contract purported upon its face to have been made by an agent, and it is set forth in full in the complaint, it must be alleged that the agency was duly constituted.[2]

§ 985. **Writing Implied.**—An award set forth, "as in the form following," and with a date, may be presumed to have been in writing.[3] When the terms and conditions of an agreement are set out in a complaint, and the violation of that agreement is charged against the defendant, if it is such an instrument as the law requires to be in writing, and the complaint is silent whether it was oral or in writing, courts will presume it was a lawful written instrument, until the contrary appears.[4]

§ 986 **On a Bond for the Payment of Money Only.**

Form No. 253.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of ..... dollars.

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 987. **Breach, how Alleged.**—It is not alone sufficient to show a technical breach of the literal terms of a covenant in a bond; but upon a reasonable interpretation of the intent and meaning of the covenant, to be ascertained from all its terms, it must likewise appear that some substantial right guaranteed thereby has been infringed, or some of its purposes defeated.[6] It is suggested that specific breaches should be assigned, even on a mere money bond.[7] In California, where the contract or bond was for payment in gold coin, it must be averred, and judgment demanded accordingly.

§ 988. **Mutilated Bond.**—If the obligee tear off the seal or cancel a bond, in consequence of fraud and imposition practiced by the obligor, he may declare on such mutilated bond as the deed of the party, making a proper averment of the special facts.[8]

§ 989. **What Written Obligation Imports.**—The term "written obligation" imports a sealed instrument.[9] Under the

[1] Sayre v. Nichols, 7 Cal. 535; see Tolmie v. Dean, Wash. Terr. 46. That "executed" implies "subscribed," see Cheney v. Cook, 7 Wis. 413.

[2] Regents v. Detroit Society, 12 Mich. 138.

[3] Munro v. Alaire, 2 Cai. 320.

[4] Van Doren v. Tjader, 1 Nev. 380.

[5] What averments on a bond are sufficient to charge a garrantor, see Tappan v. Cleveland R. R. Co., 4 West. Law Month. 67.

[6] Levitsky v. Johnson, 35 Cal. 41.

[7] Western Bank v. Sherwood, 29 Barb. 383.

[8] 3 T. R. 153; United States v. Spalding, 2 Mason Cir. Ct. 478.

[9] Clark v. Phillips, Hempst. 294.

statutes of California, bonds are on the same footing as undertakings.[1]

§ 990. **On a Bond—Pleading It according to its Legal Effect.**

Form No. 254.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ...., the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of [state the actual debt], in gold coin, on the ..... day of ....., with interest from, etc. [or otherwise, according to the condition].

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 991. **By a Surviving Obligee, on a Joint Bond.**

Form No. 255.

[TITLE.]

The plaintiff complains, and alleges:

I. That on ..... day of ....., 18...., at ....., the defendant made and sealed his certain bond, of which the following is a copy [copy the bond], and thereby covenanted with the plaintiff and one R. N. to pay them the sum of ..... dollars [on, etc., stating when it became payable].

II. That on the ..... day of ...., 18..., at ....., said R. N. died.

III. That no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 992. **Averment of Death of Joint Obligee.**—One of two joint obligees can not sue, unless he avers that the other is dead. Wherever, by reason of a several interest, one may sue, he must set forth the bond truly, and then by proper averments show a cause of action in himself alone.[2]

§ 993. **Joint and Several Bonds.**—No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only.[3] It is otherwise as to a joint and several bond, where each signer is considered bound without the signature of the others named as obligors.[4] Where a complaint is against two or three obligors, it must aver that all three have failed to pay the debt.[5] Under the statute of Indiana, the representatives of a deceased joint obligor may be sued on a joint and several obligation.[6] A dec-

[1] Canfield v. Bates, 13 Cal. 606.
[2] Gale v. Purdy, 6 Wend. 629.
[3] Sacramento v. Dunlap, 14 Cal. 421.
[4] Sacramento v. Dunlap 14 Cal. 421.
[5] Robins v. Pope, Hempst. 219
[6] Curtis v. Bowrie, 2 McLean, 374.

laration in an action of debt against the obligor, setting forth a joint and several bond, can not be annulled by adding a new count, setting forth a bond by the defendant and another person.[1]

CHAPTER II.

BILLS OF EXCHANGE.

§ 994. Foreign Bills—Payee against Drawer for Non-acceptance.

Form No. 256.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant made and delivered to the plaintiff his certain bill of exchange of that date, of which the following is a copy [copy the bill]:

II. That on the ..... day of ....., 18..., the same was duly presented to the said ..... for acceptance, but was not accepted, and was thereupon duly protested for non-acceptance.

III. That due notice thereof, was given to the defendant.

IV. That he has not paid the same.

V. That the value of a similar bill of exchange at the time of said protest, in ....., that being the place where said bill was negotiated, and where such bills were currently sold, was ..... dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of ..... dollars [the amount named in the bill], and ..... dollars damages, and interest on said sums from the ..... day of ....., 18... [date of protest], and costs of suit [2]

§ 995. **Definition.**—A bill of exchange drawn in one state upon a person in another, is a foreign bill.[3] And such bills are, by the custom of merchants, protested if dishonored.[4]

§ 966. **Alteration.**—If a person who has no authority to do so, and who is not the agent of the payee for that purpose, writes across the face of a draft, payable generally in money, the words, "payable in United States gold coin," it is not such an alteration of the draft as vitiates it.[5] An alteration is ma-

[1] Postmaster General v. Ridgeway, Gilp. 135.

[2] The fifth paragraph above is drawn under section 3238 of the California Civil Code.

[3] Dickens v. Beal, 10 Pet. 572; Buckner v. Finley, 2 Id. 586; Bank of United States v. Daniel, 12 Id. 32.

[4] Townsley v. Sumrall, 2 Pet. 170.

[5] Langenberger v. Kroeger, 48 Cal. 147; see, also, Flint v. Craig, 59 Barb. 319.

terial and vitiating which, in any event, may alter the promisor's liability, if made without his consent at the time, unless subsequently approved by him.[1] Erasing the words "to order of," and inserting "or bearer" instead, is material, and avoids the note.[2] In such case it matters not whether the alteration was with fraudulent intent or not, except as such intention affects the right to resort to the original indebtedness.[3]

§ 997. **Damages on Foreign Bills, Protested.**—In California, damages are allowed, as a full compensation for interest accrued before notice of dishonor, re-exchange, expenses, and all other damages, in favor of holders for value only, upon bills of exchange drawn or negotiated in that state, and protested for non-acceptance or non-payment, as follows: 1. If drawn upon any person in this state, two dollars upon each one hundred of the principal sum specified in the bill; 2. If drawn upon any person out of this state, but in any of the other states west of the Rocky Mountains, five dollars upon each one hundred; 3. If drawn upon any person in any of the United States east of the Rocky Mountains, ten dollars upon each one hundred; 4. If drawn upon any person in any foreign country, fifteen dollars upon each one hundred.[4]

§ 998. **Demand.**—If a draft does not specify the kind of money in which it is made payable, a demand of payment in gold coin, whether by a notary or the holder, is not sufficient to charge the drawer. The demand must be in accordance with the tenor of the draft.[5] In the absence of evidence to the contrary, the presumption is that the notary demands payment in the kind of money in which it appears on its face to be made payable.[6]

§ 999. **Dishonor.**—In California a bill of exchange, payable a certain time after sight, which is not accepted within ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance, is presumed to have been dishonored.[7] A negotiable instrument is dishonored when it is either not paid or not accepted according to its tenor, on presentment for that purpose, or without

[1] Langenberger v. Kroeger, 48 Cal. 147; see, also, Flint v. Craig, 59 Barb. 319.

[2] Booth v. Powers, 56 N. Y. 22.

[3] Id.; see, also, Meyer v. Huneke, 55 N. Y. 412; reversing S. C., 65 Barb. 304; Seibel v. Vaughan, 69 Ill. 257; Beal v. Roberts, 118 Mass. 525; Evans v. Foreman, 60 Mo. 449; Goodspeed v. Cutler, 75 Ill. 534.

[4] Civil Code, secs. 3234, 3235; see, also, Pratalongo v. Larco, 47 Cal. 378, as to who is the holder in the sense of the statute.

[5] Langenberger v. Kroeger, 48 Cal. 147.

[6] Id.

[7] Civil Code of California, sec. 3133.

presentment, where that is excused.[1] Although a check may be actually dishonored by a refusal to pay upon proper demand before presumptive dishonor, yet to charge the check with the infirmity of dishonor in the hands of a third party to whom it has been transferred for a valuable consideration before the expiration of the reasonable time which must elapse before presumptive dishonor, notice of the previous actual dishonor must be brought home to him, or he holds it free from the taint of dishonor.[2]

§ 1000. **Difference of Exchange.**—On a bill of exchange, payable at a particular place, it seems that the difference of exchange may be recovered, if the declaration contains the proper averment; but this is not the rule where the action is on a note, and there is no count or allegation in the declaration to cover the rate of exchange.[3]

§ 1001. **Non-Payment.**—In a declaration on a foreign bill of exchange for non-payment, no averment of a presentment for acceptance, or of a refusal and protest for non-acceptance of the bill is necessary.[4]

§ 1002. **Notice of Dishonor.**—Notice of dishonor may be given by a holder, or by any party to the instrument who might be compelled to pay it to the holder, and who would, upon taking it up, have a right to reimbursement from the party to whom the notice is given.[5]

§ 1003. **Omission of Demand and Notice.**—The omission of demand and notice, when it can not possibly operate to the injury of the indorser of a note or drawer of a bill, does not discharge him; but the mere insolvency of the maker does not excuse neglect in presenting it.[6]

§ 1004. **Protest, when Necessary.**—Protest of a domestic note is unnecessary.[7] A bill of exchange drawn in one state upon a citizen in another state is a foreign bill, and protest is necessary to charge the indorser.[8]

§ 1005. **Waiver of Demand.**—A promise by an indorser after notice of non-payment of a note, and with full knowledge of all the circumstances attending presentment and demand, to pay the note or give a new one, will constitute a waiver of any

[1] Civil Code, sec. 3141.
[2] Himmelmann v. Hotaling, 40 Cal. 111.
[3] Weed v. Miller, 1 McLean, 423.
[4] Brown v. Barry, 3 Dall. 365.
[5] Civil Code, sec. 3142. For service of notice see Id., secs. 3144-3151. As to what will excuse presentment and notice, see Id., secs. 3155-3160; see, also, Himmelmann v. Hotaling, 40 Cal. 111.
[6] Smith v. Miller, 52 N. Y. 545.
[7] Brennan v. Lowry, 4 Daly, 253.
[8] Commercial Bank of Kentucky v. Varnum, 49 N. Y. 269.

irregularities in presenting or demanding the same, and even of presentment and demand itself.[1]

§ 1006. **Parties.**—An agent to whom a bill of exchange has been indorsed in blank for collection, may fill up the assignment to himself, and bring suit in his own name.[2]

§ 1007. **Payee against Acceptor.**—

Form No. 257.

[Title.]

The plaintiff complains, and alleges:

I. That on the .... day of ....., 18 ..., at ....., the defendant made and delivered to the plaintiff his certain bill of exchange of that date, of which the following is a copy [copy the bill].

II. That on the ..... day of ....., 18 ..., at ....., the defendant accepted the said bill.

III. That he has not paid the same, nor any part thereof.

[Demand of Judgment.][3]

§ 1008. **Acceptance.**—In an action against B., as sole acceptor of a bill of exchange, the plaintiffs were entitled to recover under a count in the declaration, stating the bill to have been drawn on "B. & Co.," and to have been accepted by B., by the name and style of "B. & Co.," by writing the name of "B. & Co." thereon.[4]

§ 1009. **Letter of Credit.**—A letter of credit, promising unconditionally to accept bills drawn upon its faith, is an actual acceptance in favor of a person who, upon its faith, receives a bill so drawn for a valuable consideration.[5]

§ 1010. **Promise to Indorse.**—A promise to indorse under a letter of credit representing a person to be good, and saying that the writer will indorse for him on a purchase to a certain amount, the writer is not liable directly for the amount of a sale without any request to indorse, and unless an indorsement is required no action can be maintained.[6]

§ 1011. **On Inland Bills—Drawer against Acceptor for Non-payment.**

Form No. 258.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 ..., at .....,

[1] Meyer v. Hibsher, 46 N. Y. 265; Richard v. Boller, 51 How. Pr. 371.

[2] Orr v. Lacy, 4 McClean, 243.

[3] To recover statutory damages, see preceding form.

[4] City Bank of Columbus v. Beach, 1 Blatchf. 438; compare Lapeyre v. Gales, 2 Cranch C. Ct. 291.

[5] Naglee v. Lyman, 14 Cal. 450.

[6] Stafford v. Low, 16 Johns. 67; Stockbridge v. Schoonmaker, 45 Barb. 100.

the defendant made and delivered to the plaintiff his certain bill of exchange of that date, of which the following is a copy [copy of the bill].

II. That the defendant thereafter accepted the said bill.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1012. **Acceptance.**—A promise that a drawer will pay a draft which may be drawn on him, is an acceptance, and he may be sued as acceptor.[1] An unconditional promise, in writing, to accept a bill of exchange, is a sufficient acceptance thereof, in favor of every person who upon the faith thereof has taken the bill for value or other good consideration.[2] If the bill is payable at a certain time after "sight," the date of acceptance should be stated; otherwise it is not necessary. A bill drawn payable so many days after sight, means after presentment for acceptance.[3]

§ 1013. **Acceptor.**—A person, not personally a party to a bill of exchange, who for a consideration accepts the same, is an acceptor, equally as if he were drawee.[4] The loss of the acceptance by the drawee is a sufficient consideration for the acceptance by the third person.[5]

§ 1014. **Corporations.**—Where a draft is drawn by the president and secretary of a corporation upon its treasurer, no notice of presentation and non-payment is necessary to hold the corporation.[6] The burden of proof is on the corporation to show that the drawee was provided with funds and ready to pay at maturity, in order to exempt them from damages and costs.[7]

§ 1015. **Equities between Parties.**—Where a creditor takes a bill before maturity, as collateral security for an antecedent debt, if there be any change in the legal rights of the parties, the creditor becomes the holder for value, and the bill is not subject to the equities between the parties.[8]

§ 1016. **Form of Bill.**—The following written order possesses all the requisites of an inland bill of exchange: "Mr.

[1] Wakefield v. Greenwood, 29 Cal. 597.

[2] Civil Code, sec. 3197. As to how acceptance is made, who entitled to, what sufficient, acceptance by separate instrument, what acceptance admits, and cancellation of acceptance, see Civil Code (Cal.), sec. 3193, and following.

[3] Mitchell v. Degrand, 1 Mason, 175.

[4] Kelly v. Lynch, 22 Cal. 661.

[5] Id.

[6] Dennis v. Table Mountain Water Co., 10 Cal. 369.

[7] Wolcott, etc., v. Van Santvoord, 17 Johns. 248; Fairchild v. Ogdensburgh, Clayton & Rome R. R. Co., 15 N. Y. 337.

[8] Naglee v. Lyman, 14 Cal. 450; Robinson v. Smith, Id. 95.

....., Please pay the bearer of these lines ..... dollars, and charge the same to my account."[1] The following document is a negotiable bill of exchange: "July 15, 1865. On first of August next, please pay to A., or order, £600, on account of moneys advanced to me by the S. Company. To Mr. W., Official Liquidator of the Company."[2] The words "or order," "or bearer," in notes, bills and checks, are words of negotiability, and the use of either of them makes the paper negotiable, although impersonal words are used in naming a payee.[3] The insertion of the word "please" does not alter the character of the instrument.[4] "Value received" is not necessary to show a consideration.[5]

§ 1017. **Satisfaction of Demand.**—A bill of exchange operates only as a conditional payment, but if the creditor fails to present it for payment to the drawee, it becomes *pro tanto* a satisfaction of the demand.[6]

§ 1018. **Who May Recover.**—A bill indorsed to the treasurer of the United States may be sued and declared on in the name of the United States, and the averment that it was indorsed to them immediately is good.[7] Where the complaint stated the bill drawn on "B. & Co.," and to have been accepted by B. by the name and style of B. & Co., by writing the name of B. & Co., the plaintiff may recover.[8]

§ 1019. **The Same—On a Bill Payable to Drawer's Own Order, and not Negotiated.**

Form No. 259.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiffs [under their firm name of A. B. C. & Co.], by their bill of exchange, required the defendant to pay to the order of the plaintiffs ..... dollars, ... days after date thereof [or otherwise]. A copy of which said bill of exchange is hereto attached and made part of this complaint.

II. That on the ..... day of ....., 18..., the defendant accepted the bill.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[1] Wheatley v. Strobe, 12 Cal. 92.
[2] Griffin v. Weatherby, L. R., 3 Q. B. 753.
[3] Mechanics' Bank v. Straiton, 5 Abb. Pr., N. S., 11.
[4] Wheatley v. Strobe, 12 Cal. 92.
[5] Benjamin v. Tillman, 2 McLean, 213.
[6] Brown v. Cronise, 21 Cal. 386.
[7] U. S. v. Barker, 1 Paine U. S. 156.
[8] City Bank of Columbus v. Beach, 1 Blatchf. 438. Compare Lapeyre v. Gales, 2 Cranch C. C. 291.

§ 1020. **The Same—Bill Returned and Taken Up.**

Form No. 260.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff, by his bill of exchange, required the defendant to pay to one A. B..... dollars, ... days after the date thereof. A copy of which bill of exchange and the acceptance thereon indorsed, is hereto attached and made part of this complaint.

II. That on the ..... day of.. ....., 18..., at ....., the defendants, upon sight thereof, accepted the same for value received.

III. That at maturity the same was presented for payment, but was not paid.

IV. That on the..... day of ....., 18..., the same was returned to the plaintiff for non-payment, and the plaintiff, as drawer thereof, was then and there compelled to take up the same and to pay to the holder thereof the sum of ..... dollars, being the amount of said bill, with damages and interest.

V. That no part of the same has been repaid.

[DEMAND OF JUDGMENT.]

§ 1021. **Payable to Third Persons.**—When the drawer sues on a bill payable to a third person, it is necessary to state that it was dishonored, taken up, and paid by the plaintiff.[1]

§ 1022. **Sufficient Averment.**—A complaint against the drawees of a bill, alleging that they had refused to accept, and that they had a settlement of accounts with the drawers, and that on such settlement the drawers had in their hands sufficient money to pay the bill, which they had agreed to pay, is sufficient.[2]

§ 1023. **By Acceptor, without Funds, against Drawer.**

Form No. 261.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant became indebted to him for money advanced by him, and paid by him, upon a certain draft drawn by the defendant, bearing date on the ..... day of ....., 18..., whereby the defendant requested the plaintiff ..... days after date, to pay to one A. B. the sum of ..... dollars.

II. That on the ..... day of ....., 18.., at ....., the plaintiff accepted said draft, and paid it.

[1] 2 Chit. Pl. 148.

[2] Mittenbeyer v. Atwood, 18 How. Pr. 330.

[Or II. That the plaintiff accepted said draft, and paid the same at maturity.]

III. That at the time of the acceptance and payment of said draft, the plaintiff was without funds of the defendant in his hands to meet the same.

IV. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1024. **The Same—By a Copartnership Firm against Another Firm, on a Draft Accepted and Paid by Plaintiffs.**

Form No 262.

[TITLE.]

The plaintiffs complain, and allege:

I. That on the ..... day of ....., 18..., the defendants, then composing the firm of C. D. & Co., drew their certain bill of exchange, in said copartnership name, at ....., and directed the same to the plaintiffs at ....., who then were and now are copartners, doing business under the firm name of A. B. & Co., by which bill of exchange the said defendants requested the plaintiffs to pay to the order of said defendants, four months after date, the sum of ..... dollars, for value received.

II. That said bill of exchange the plaintiffs afterwards accepted and paid in full.

III. That no funds were provided by said defendants, either before or after the same was drawn as aforesaid for the payment thereof, and the plaintiffs have had no funds of said defendants at any time in their hands to pay the same.

[DEMAND OF JUDGMENT.]

§ 1025. **Payee against Drawer, for Non-acceptance.**

Form No 263.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant, by his bill of exchange, required one C. D. to pay to the plaintiff ..... dollars [..... days after sight].

II. That on the ..... day of ....., 18..., the same was duly presented to the said C. D. for acceptance, but was not accepted.

III. That due notice thereof was given to the defendant.

IV. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1026. **Allegation Setting Out Copy of Bill.**

Form No. 264.

That on the ..... day of ....., 18..., at ....., the

defendants made and delivered to the plaintiff their bill of exchange, of which the following is a copy [copy of bill].

§ 1027. **Allegation of Demand and Notice Excused by Waiver.**

Form No. 265.

That the defendant at the time said bill was transferred by him, waived as well the presentation of the same to said ..... for payment, as notice of the non-payment thereof.

§ 1028. **Allegation of Excuse for Non-presentment — Bill Countermanded.**

Form No. 266.

That on or about the ..... day of ....., 18..., said bill not then having been presented for acceptance [or for payment], the defendant countermanded the same by instructions to the said [drawee] not to accept or pay [or, if payable at sight, not to pay] the same: wherefore it was not presented.

§ 1029. **Allegation of Excuse for Non-presentment — Drawee not Found.**

Form No. 267.

That on the, etc., due search and inquiry was made for said ..... at [state the place of address], that the same might be presented for acceptance, but he could not be found, and the same was not accepted.

§ 1030. **Averment of Protest.** — That said bill was duly protested at maturity, is sufficient to admit evidence of demand, neglect to pay, and notice of non-payment.[1] The holder of a bill, upon protest for non-acceptance, has an immediate cause of action against the drawer, and averments of demand of payment and protest might be rejected if the declaration counted properly for non-acceptance.[2]

§ 1031. **Necessary Averments.** — In a complaint against the drawer of a bank check, or of a bill of exchange properly so called, it is necessary to aver either demand, and notice to the drawer of non-payment, or such facts as excuse demand, and notice, *e. g.*, want of funds at bank.[3]

§ 1032. **The Same — Form of Allegation Where Bill was payable at a Specific Date.**

Form No. 268.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant made and delivered to the plaintiff his bill of

[1] Woodbury v. Sackrider, 2 Abb. Pr. 405.

[2] Mason v. Franklin, 3 Johns. 202.

[3] Shultz v. Dupuy, 3 Abb. Pr. 252.

exchange, directed to E. F., and required said E. F. to pay to the plaintiff ..... dollars on the ..... day of ...., 18... [or at sight, or ..... days after date thereof, or after sight thereof], for value received.

II. That the same was presented to E. F. for payment, but was not paid.

III. [If a foreign bill.] That the same was duly protested for non-payment.

IV. That notice thereof was given to the defendant.

V. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1033. **By Partners Payees against Partners Acceptors.**

Form No. 269.

[TITLE.]

A B. and C. D., the plaintiffs in the above-entitled action, complain of E. F. and G. H., the defendants, and allege:

I. That at the times hereinafter mentioned, the said plaintiffs were partners, doing business at ....., under the firm name of "A. B. & Co.," and the said defendants were partners, doing business at ....., under the firm name of "E. F. & Co."

II. That on the .... day of ....., 18..., at ...., L. M. and N. O., partners, doing business under the firm name of "L. M. & Co.," under their said firm name made their certain bill of exchange in writing, payable in gold coin of the United States, directed to the defendants, under their said firm name of "E. F. & Co.," bearing date on that day, in the words and figures following, to wit [copy of bill].

III. That on the ..... day of ....., 18..., at ....., the said defendants, under their said firm name of "E. F. & Co.," upon sight thereof, accepted said bill of exchange.

IV. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1034. **Acceptance.**—It is not necessary to copy the acceptance, nor even to aver that it was in writing. It is enough to aver its acceptance.[1] Where a draft is accepted conditionally

[1] Horner v. Wood, 15 Barb. 371; Bank of Lowville v. Edwards, 11 How. Pr. 216; Fowler v. N. Y. Indem. Ins. Co., 23 Barb. 150; Gibbs v. Nash, 4 Id. 449; Washburn v. Franklin, 28 Id. 27; 7 Abb. Pr. 8; and see *dicta*, *contra*, Thurman v. Stevens, 2 Duer, 609; Le Roy v. Shaw, Id. 628; Merwin v. Hamilton, 6 Id. 248; as the acceptance of a bill of exchange must be in writing: Civil Code Cal., secs. 3193, 3194; Wheatley v. Strobe, 12 Cal. 92.

to be paid upon the happening of a contingency, the question whether it has happened is a question of fact.[1]

§ 1035. **Copy of Bill.**—The holder must sue on that one of the set which was dishonored.[2] Where a second of exchange was dishonored, and the first was subsequently paid previous to suit brought, the drawer was released from damages for the dishonor.[3]

§ 1036. **Drafts on Appropriation.**—A draft payable in terms out of an "appropriation," for work done by the acceptor, becomes due on payment for the work by government.[4]

§ 1037. **Gold Coin.**—Under the statute of California, if the written instrument provided for payment in gold coin, the complaint and demand for judgment should be for gold coin, and judgment will thereupon be entered up accordingly.

§ 1038. **Non-acceptance, Effect of.**—The want of acceptance affects the right of the payee only as to his mode of enforcing payment.[5]

§ 1039. **Notice.**—Notice may be given to the indorser or others entitled to notice immediately after presentment to the maker or acceptor, and the refusal of the same to pay.[6] Any notice is sufficient, if it informs the party of the fact.[7]

§ 1040. **Part Payment.**—When the drawee pays a part of the draft, and receipts on the back of the order the amount paid, and it is signed by the payee, it is not an acceptance.[8] It is evidence that the drawee owed that amount and paid it.[9] The acceptance of a note of a third party by the creditor is accompanied with the condition that the note shall be paid at maturity.[10]

§ 1041. **Presentment.**—In an action against the maker of a note or the acceptor of a bill of exchange, in which the place of payment is fixed, it is not necessary to aver presentment at that place and refusal to pay.[11]

§ 1042. **Payee against Acceptor—Short Form.**

Form No. 270.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., the defendant

[1] Nagle v. Homer, 8 Cal. 353.
[2] Downes v. Church, 13 Pet. 205; Wells v. Whitehead, 15 Wend. 527.
[3] Page, Bacon & Co. v. Warner, 4 Cal. 395.
[4] Nagle v. Homer, 8 Cal. 353.
[5] Wheatley v. Strobe, 12 Cal. 92.
[6] McFarland v. Pico, 8 Cal. 626.
[7] McFarland v. Pico, 8 Cal. 626; see Minturn v. Fisher, 7 Cal. 573.
[8] Bassett v. Haines, 9 Cal. 260.
[9] Id.
[10] Griffith v. Grogan, 12 Cal. 317.
[11] Montgomery v. Tutt, 11 Cal. 307. Case in which the evidence shows sufficient diligence in presenting draft for payment: Brown v. Olmsted, 50 Id. 162.

accepted a bill of exchange made [or purporting to have been made] by one C. D., on the ..... day of ....., 18..., at ....., requiring the defendant to pay to the plaintiff ..... dollars, ... after sight thereof. A copy of said bill of exchange is hereto attached, marked "A," and made part of this complaint.

II. That he has not paid the same.

[DEMAND OF JUDGMENT.]

§ 1043. Allegation Setting Out Copy of Bill.

Form No. 271.

That on the ..... day of ....., 18.., at ....., the defendant A. B. accepted and delivered to the plaintiff a bill of exchange, of which the following is a copy.

[Copy bill and acceptance.][1]

§ 1044. **Corporation.**—Where defendant is a corporation, and the bill is accepted by the president thereof as such, an averment that he was president, and as such authorized to accept, is not necessary.[2]

§ 1045. **Costs of Protest.**—A claim for statutory damages and costs of protest need not be set forth in the petition as a separate and distinct cause of action, disconnected from the claim on the bill.[3]

§ 1046. The Same—Pleading the Legal Effect.

Form No. 272.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., one A. B., by his bill of exchange in writing, dated on that day, required the defendants to pay to the order of the plaintiff ..... dollars, ... days after said date [or otherwise], for value received.

II. That on the ..... day of ....., 18..., at ....., the defendant upon sight thereof, accepted said bill, of which, and the acceptance thereof, the following is a copy [copy the bill].

III. That he has not paid the same, or any part thereof.

[DEMAND OF JUDGMENT.]

§ 1047. **Consideration on Acceptance.**—A written agreement to accept amounts to an acceptance, and no consideration need be shown.[4]

[1] Andrews v. Astor Bank, 2 Duer, 629; Levy v. Lev, 6 Abb. Pr. 89.

[2] Partridge v. Badger, 25 Barb. 146; Andrews v. Astor Bank, 2 Duer, 629; Price v. McClave, 6 Id. 544.

[3] Summit County Bank v. Smith, 1 Handy, 575.

[4] Ontario B'k v. Worthington, 12 Wend. 593.

§ 1048. **Party in Interest.**—In an action on a draft, brought by the Camden Bank against the drawer, after showing that the draft was made payable "to the order of W. B. Storm, cashier," an averment that the defendant "delivered the said draft to W. B. Storm, cashier of said Camden Bank, for the said bank," and that "the said draft is now held and owned by the said plaintiffs, and still remains due to them from the defendants," sufficiently shows that the bank, and not the cashier, is the real party in interest.[1]

§ 1049. **Presentment.**—Against the acceptor, it is not necessary to aver or prove presentment at the place where the bill was made payable.[2]

§ 1050. **Promise to Accept.**—In an action brought upon a promise made by the defendant to accept a draft which another might draw on him, it is not necessary to aver that the promise was in writing.[3]

§ 1051. **The Same—Acceptance Varying as to Time from the Bill.**

Form No. 273.

[Title.]

I. [Allege making of bill as in preceding form.]

II. That on the ..... day of ....., 18 ..., at ....., the defendant [or the defendants under their firm name], upon sight thereof, accepted the same, payable at ..... days [or otherwise] after the date of said bill [or after said day of acceptance]. A copy of which said bill, and the acceptance thereof, is hereto attached and made part of this complaint.

III. That he has [they have] not paid the same, nor any part thereof.

[Demand of Judgment.]

§ 1052. **Were Drawer is also Acceptor, on Bill Drawn on Himself.**

Form No. 274.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 ..., at ....., the defendant made and accepted, and delivered to the plaintiff, his bill of exchange in writing, of which the following is a copy [copy of the bill and acceptance].

II. That he has not paid the same, nor any part thereof.

[Demand of Judgment.]

[1] Camden Bank v. Rodgers, 4 How Pr. 68.

[2] Wolcott v. Van Santvoord, 17 Johns. 248; Caldwell v. Cassidy, 8 Cow. 271; Haxton v. Bishop, 3 Wend. 13.

[3] Wakefield v. Greenhood, 29 Cal. 597; Bank of Lowville v. Edwards, 11 How. P. 216.

§ 1053. **By Assignee of a Bill Payable Out of a Particular Fund.**

Form No. 275.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the..... day of ....., 18..., at ....., one A. B. made his bill of exchange or order in writing, dated on that day, and directed it to the defen lant, and thereby required the defendant to pay to one C. D., out of the proceeds of [state fund as in the bill] ..... dollars..... days after the date thereof, and delivered it to said C. D.

II. That on the ..... day of ..... 18 ..., at....., upon sight thereof, the defendant accepted the same, payable, when in funds, from the proceeds of [etc., as in acceptance].

III. That on the ..... day of....., 18..., at ....., said C. D. assigned said bill to this plaintiff. The following is a copy of said bill of exchange, and of the said acceptance and assignment thereof [copy same].

IV. That on the ..... day of ....., 18..., the defendant had funds of the said A. B., proceeds of, etc.

V. That on the ..... day of....., 18 ..., at ....., the plaintiff demanded payment thereof from the defendant.

VI. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1054. **Allegation that Defendant Accepted.**—An acceptance generally without words of restriction to a fund or contingency, will in some cases bind the acceptor absolutely.[1]

§ 1055. **Payee against Drawer and Acceptor—On a Bill Accepted by the Drawee.**

Form No. 276.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 ..., at ....., the defendant A. B., by his bill of exchange, required one C. D. to pay to the plaintiff ..... dollars, ... days after the date thereof [or otherwise].

II. That on the ..... day of ....., 18 ..., the defendant C. D., upon sight thereof, accepted said bill. The following is a copy of said bill and of said acceptance [insert copy].

III. That at maturity the same was presented to the defendant C. D. for payment, but was not paid.

[1] Atkinson v. Manks, 1 Cow. 691; Maber v. Massias, 2 W. Blackst. 1072; Lent v. Hodgman, 15 Barb. 274.

IV. That notice thereof was given to the defendant A. B.

V. That no part of the same has been paid.

[DEMAND OF JUDGMENT.]

§ 1056. **By Payee, on a Bill Accepted for Honor.**

Form No. 277.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., the defendant A. B., by his bill of exchange, required one C. D. to pay to the plaintiff ..... dollars ..... days after the date thereof [or otherwise]. The following is a copy of the said bill of exchange, and of all acceptances thereon [insert copy of same].

II. That on the ..... day of ....., 18.., the same was presented to the said C. D. for acceptance, but was not accepted.

III. That notice thereof was given to the defendant A. B.

IV. That on the ..... day of ....., 18..., at ....., the defendant E. F. [acceptor for honor], upon sight thereof, accepted said bill for the honor of said A. B.

V. That at maturity the same was presented for payment to said C. D., but was not paid.

VI. That notice thereof was given to the defendant, A. B.

VII. That thereupon the same was duly presented to the defendant, E. F. [acceptor for honor], for payment, but was not paid.

VIII. That notice thereof was given to the defendant, A. B.

IX. That no part of the same has been paid.

[DEMAND OF JUDGMENT.]

§ 1057. **Accommodation Acceptor.**—The accommodation acceptor who pays without funds, can recover from the drawer, not upon the bill, but for money paid.[1]

§ 1058. **Presentment at Maturity.**—In a complaint against acceptor for honor, the plaintiff must show that the bill was presented at maturity to the drawee, and that the drawer had notice of non-payment.[2] It is not necessary to aver that the demand was made of the maker at the place specified in the note, in a complaint under the code. Such a demand was, by authority settled to be a condition precedent under the late practice, and the averment essential to a recovery. But section 162 of the code (New York) has dispensed with the necessity of

[1] Griffith v. Reed, 21 Wend. 502; Suydam v. Westfall, 4 Hill 211.

[2] Williams v. Germaine, 7 Barn. & Cress. 468; Schofield v. Bayard, 3 Wend. 488.

pleading the facts which constitute the performance of a condition precedent.[1]

§ 1059. **By Indorsee—First Indorsee against Acceptor.**

Form No. 278.

[TITLE]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., the defendant accepted a bill of exchange, made by one A. B., on the ..... day of ....., 18.., at ...., requiring the defendant to pay to the order of one C. D., ... dollars ..... after sight thereof, of which the following is a copy [insert copy].

II. That the said C. D. indorsed the same to the plaintiff.

III. That defendant has not paid the same.

[DEMAND OF JUDGMENT.]

§ 1060. **First Indorsee Against First Indorser.**

Form No. 279.

[TITLE]

The plaintiff complains, and alleges:

I. That the defendant indorsed to the plaintiff a bill of exchange, made by one A. B., on the ..... day of ....., 18..., at ....., requiring one C. D. to pay to the order of the defendant ..... dollars, ... [days] after sight [or after date, or at sight] thereof, and accepted by the said C. D. on the ..... day of ...., 18..., at ..... The following is a copy of said bill of exchange, and of said indorsement and acceptance [insert copy].

II. That on the ..... day of ....., 18..., at ....., the same was presented to the said ....., for payment, but it was not paid.

III. That due notice thereof was given to the defendant.

IV. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1061. **First Indorsee against Drawer and Indorser—For Non-acceptance.**

Form No. 280.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant, by his bill of exchange, required one C. D. to pay to the order of one E. F. ..... dollars ..... days after the date thereof [or otherwise].

[1] Gay v. Paine, 5 How. Pr. 107; Woodbury v. Sackrider, 2 Abb. Pr. 402; to the contrary, Graham v. Machado, 6 Duer. 515. The later case of Ferner v. Williams, 37 Barb. 9, follows and approves Gay v. Payne.

II. That the said A. B. then and there delivered the same to the defendant E. F., who then and there indorsed it to the defendant G. H.

III. That on the .....day of ....., 18..., at....., the defendant G. H. indorsed the same to the plaintiff for value. The following is a copy of said bill of exchange and of the said indorsements thereon [copy bill and indorsements].

IV. That the same was presented to C. D. for acceptance, but was not accepted [if a foreign bill, add, and was thereupon duly protested for non-acceptance], of all which due notice was given to the defendants.

V. That no part of the same has been paid.

[DEMAND OF JUDGMENT.]

§ 1062. **Delivery.**—Where the plaintiff, as indorsee of a bill of exchange, sued the acceptor, declaring under the statute of New York, on the money counts, and appending a copy of the bill, with notice that it was his cause of action; but in the copy his indorsement was omitted, it was held that delivery was sufficiently averred by implication, that indorsement was not necessary to pass title, and that the bill was therefore admissible upon the trial of the cause.[2]

§ 1063. **First Indorsee against All Prior Parties—For Non-payment.**

Form No. 281.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of ....., 18..., at ...., the defendant A. B., by his bill of exchange, requested C. D. to pay to the order of the defendant E. F., ...dollars, ...days after the date thereof.

II. That the said A. B. then and there delivered the same to the said E. F., who thereupon indorsed it to the defendant G. H.

III. That on the .....day of ....., 18...., at ....., the said G. H. indorsed the same to the plaintiff for value.

IV. That on the ..... day of..... ., 18...., at ....., the defendant C. D., upon sight thereof, accepted said bill.

V. That at maturity the same was presented to the defendant C. D. for payment, but was not paid [if a foreign bill, add, and was thereupon duly protested for non-payment], of all which due notice was given to the defendants A. B., E. F., and G. H.

VI. That no part of the same has been paid.

[DEMAND OF JUDGMENT.]

[1] For authority for a longer but similar form, see Phelps v. Ferguson 9 Abb Pr. 206; Greenbury v. Wilkins, Id., note.

[2] Purdy v. Vermilya, 4 Seld. 346.

§ 1064. **Subsequent Indorsee against Acceptor.—**

Form No. 282.

[TITLE]

I. [Allege acceptance of bill, as in form No. 281.]

II. That by the indorsement of said ....., the same was transferred to the plaintiff for value.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1065. **Subsequent Indorsee against First Indorser—Indorsement Special.**

Form No. 283.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to one C. D. a bill of exchange, made by one A. B., on the ..... day of ....., 18..., at ....., requiring E. F. to pay to the order of the defendant ..... dollars, ... days after sight thereof [or otherwise], and accepted by the said E. F. on the ..... day of ...., 18..., at.....

II. That the same was by the indorsement of the said C. D., transferred to the plaintiff.

III. That on the ..... day of ....., 18..., at ....., the same was presented to the said E. F. for payment, but it was not paid.

IV. That notice thereof was given to the defendant.

V. That he has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1066. **Subsequent Indorsee against Intermediate Indorser.**

Form No. 284.

[TITLE.]

The plaintiff complains, and alleges:

I. That a bill of exchange made by one A. B. on the ..... day of ....., 18.., at ....., requiring one C. D. to pay to the order of one E. F ..... dollars, ... days after sight thereof [or otherwise], [accepted by said C. D.], and indorsed by the said E. F. to the defendant, was by the indorsement of the defendant [and others], transferred to the plaintiff.

[Allege presentment, notice, and non-payment as in form No. 283.]

[DEMAND OF JUDGMENT.]

§ 1067. **Subsequent Indorsee against Last Indorser.**

Form No. 285.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to him a bill of exchange, made [or purporting to have been made] by one A. B., on the ..... day of ....., 18..., at ....., requiring one C. D. to pay to the order of one E. F. ..... dollars, ... days after sight thereof [or otherwise], [accepted by the said C. D.], and indorsed by the said E. F. to the defendant.

II. That on the ..... day of ....., 18..., at ....., the same was presented to the said C. D. for payment, but it was not paid.

III. That due notice thereof was given to the defendant.

IV. That he has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1068. **Subsequent Indorsee Against all Prior Parties—Short Form.**

Form No. 286.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant A. B., by his bill of exchange, required the defendant C. D. to pay to the order of the defendant E. F., ... dollars, ... days after sight thereof.

II. That on the ..... day of ..... 18..., the said C. D. accepted the same.

III. That the said E. F. indorsed the same to the plaintiff.

IV. That on the ..... day of ..... 18..., the same was presented to the said C. D. for payment, but was not paid.

V. That due notice thereof was given to the other defendants, and each of them.

VI. That they have not, nor has either of them, paid the same.

[DEMAND OF JUDGMENT.]

§ 1069. **The Same by a Bank in its Corporate Name.**

Form No. 287.

[STATE AND COUNTY.] [COURT.]

THE BANK OF .....
against
A. B., C. D., and E. F.

The plaintiff, a corporation, duly organized and incorporated under the laws of the state of ..... complains, and alleges [allegations same as in last form].

[DEMAND OF JUDGMENT.]

§ 1070. **Checks—Payee Against Drawer.**

Form No. 288.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the said defend-

ants were partners, doing business as merchants at ....., under the firm name of C. D. & Co.

II. That on the ..... day of ....., 18..., at ....., the defendants, under their said firm name of C. D. & Co., made their check in writing, dated on that day, payable to the order of the plaintiff, which said check is in the words and figures following, to wit [copy of check].

III. That the said check was presented on the ..... day of ....., 18..., to the said ....., for payment, but was not paid.

IV. That due notice thereof was given to the defendants.

V. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1071. **Checks—Taking after Dishonor—Consideration.**—Checks are on the same footing as bills of exchange, excepting the difference which may arise from the custom of merchants.[1] The legal presumption is that a check is drawn for money due from the drawer.[2] A party taking a check after presentment and dishonor, takes it subject to all the equities to which it was subject in the hands of the original holder.[3] When the holder of a note accepts a draft or check in payment, he is not bound to give up the note before payment of the draft or check.[4] The surrender of the note is *prima facie* evidence of its payment.[5] The presumption is that the check was given on a valid consideration, but this presumption being rebutted, plaintiff must prove that he received it in good faith, and without notice of the illegality of the consideration.[6] A check given for a gaming debt is void in the hands of all persons, except a *bona fide* holder without notice.[7]

§ 1072. **Grace.**—In California days of grace are not allowed.[8]

§ 1073. **Lost Paper.**—Where a check has been lost and paid by the banker upon a forged indorsement, in a suit for the same, where the banker refused to deliver the check to the owner, in the absence of rebutting testimony, the measure of damages is the full amount for which it was drawn.[9]

§ 1074. **Non-negotiable Draft.**—A non-negotiable draft, rendered so by the absence of any fixed amount, may be rendered negotiable by an indorsement, "balance due ..... dol-

[1] Mintburn v. Fisher, 4 Cal. 85.
[2] Headley v. Reed, 2 Cal. 322.
[3] Fuller v. Hutchings, 10 Cal. 523; but see Chambers v. Satterlee, 40 Cal. 511.
[4] Smith v. Harper, 5 Cal. 330.
[5] Smith v. Harper, 5 Cal. 330.
[6] Fuller v. Hutchings, 10 Cal. 523.
[7] Id.
[8] Civil Code, sec. 3181.
[9] Survey v. Wells, Fargo & Co., 5 Cal. 124.

lars," and signed by indorser, who is estopped thereby from setting up against it any antecedent matter, and is liable for the full amount.[1] No right of action can accrue upon a draft till payment.[2]

§ 1075. **Notice.**—In general, presentment and notice of non-payment are necessary to charge the drawer of a check.[3]

§ 1076. **Presentment.**—As against the drawer, presentment at any time before suit brought is sufficient, unless it appear that he has been prejudiced by unreasonable delay.[4] By the law merchant, it is sufficient if a check drawn upon one day be presented for payment in the usual banking hours on the next succeeding day.[5] The payee, to hold the drawer, is bound to use reasonable diligence.[6]

§ 1077. **Payment Stopped.**—Where the complaint alleged demand, refusal, and notice to defendants of non-payment, and also that before the demand the defendant had stopped its payment by notice to the officers of the bank not to pay it, and the answer denied that the defendants had notice of the non-payment, and alleged that they stopped its payment because it was obtained from them by fraud of which, as well as of its payment having been stopped, the plaintiffs had notice before they took the check, it was held that the allegation in the complaint, of notice to the defendants of non-payment, might be disregarded as surplusage; and the plaintiffs should be allowed to prove, under the pleadings, the fact that payment had been stopped. That excused the want of notice.[7]

§ 1078. **To Bearer.**—A check payable to the order of a fictitious person, *e. g.*, of a firm long since dissolved,[8] or "to the order of bills payable,"[9] is to be deemed payable to bearer, if negotiated by the maker.

§ 1079. **When Due.**—When no time of payment is mentioned, the check or note is payable immediately, and complaint should not state a time of payment.[10]

§ 1080. **Indorsee or Bearer of Check against Drawer.**

Form No. 289.

[TITLE.]

The plaintiff complains, and alleges:

[1] Garwood v. Simpson, 8 Cal. 101.
[2] Wakeman v. Vanderbilt, 8 Cal. 380.
[3] Harker v. Anderson, 21 Wend. 323; Shultz v. Dupuy, 8 Abb. Pr. 252; but compare Cruger v. Armstrong, 3 Johns. Cas. 4; Conroy v. Warren, Id. 259.
[4] Little v. Phœnix Bank, 2 Hill, 425; Harbeck v. Craft, 4 Duer, 122.
[5] Ritchie v. Bradshaw, 5 Cal. 228.
[6] Ritchie v. Bradshaw, 5 Cal. 228.
[7] Purchase v. Mattison, 6 Duer 587.
[8] Stevens v. Strang, 2 Sandf. 138.
[9] Willets v. Phœnix Bank, 2 Duer, 121.
[10] Herrick v. Bennett, 8 Johns. 374; Pearsoll v. Frazer, 14 Barb. 564. Thompson v. Ketcham, 8 Johns. 189.

I. That on the ..... day of ....., 18..., at ....., the defendant made his check in writing, dated on that day, and directed the same to the bank of A. B., requiring said bank to pay to one C. D., or order [or bearer], ... dollars for value received.

II. That the defendant then and there indorsed the same to this plaintiff.

III. That on the ..... day of ....., 18.., at ....., the same was presented to said bank of A. B. for payment, but was not paid.

IV. That due notice thereof was given to the defendant.

V. That he has not paid the same, nor any part thereof.

[Demand of Judgment.]

§ 1081. **Allegation of Excuse for Failure to Give Notice.**

Form No. 290.

That on the ..... day of ....., 18..., the same was presented to said [drawee] for payment, but the defendant had no funds with said drawee.

§ 1082. **Allegation of Excuse—Want of Funds.**—Want of funds in the drawee's hands excuses the omission to give notice of non-payment.[1] But where it is intended to rely upon want of funds as excusing demand or notice, that fact must be averred.[2]

§ 1083. **Allegation of Excuse from Insolvency of Drawee.**

Form No. 291.

That on the ..... day of ....., 18..., at ....., said [drawee] was insolvent [or had stopped payment].[3]

§ 1085. **Time.**—The time should be stated that it may appear whether it was such as to excuse the holders from a demand.[4] One who takes a check which by its date appears to have been outstanding for two years and a half, and which has "Mem." written on its face, must bear the loss arising from his taking it without inquiry.[5]

§ 1085. **Indorsee or Bearer, against Drawer and Indorser.**

Form No. 292

[Title.]

The plaintiff complains, and alleges:

[1] As to whether it excuses non-presentment, see Cruger v. Armstrong, 3 Johns. Cas. 5; Id. 259; Fitch v. Redding, 4 Sandf. 130; Franklin v. Vanderpool, 1 Hall, 88.

[2] Shultz v. Dupuy, 3 Abb. Pr. 252; Garvey v. Fowler, 4 Sandf. 665; Franklin v. Vanderpool, 1 Hall, 78.

[3] As against drawer, the drawee's insolvency is sufficient to dispense with presentment and notice: Lovett v. Cornwell, 6 Wend. 369.

[4] 1 Chit. Pl. 289.

[5] Skillman v. Titus, 3 Vroom, 96.

I. That on the ..... day of ....., 18..., at ....., the defendant, A. B., made his check, and directed the same to the bank of C. D., and thereby required said C. D. to pay to the defendant, E. F., or order [or bearer], ... dollars for value received, and delivered it to the defendant, E. F.

II. That thereupon said defendant, E. F., indorsed the same to this plaintiff for value.

III. That said check was duly presented for payment, but was not paid.

IV. That due notice thereof was given to the defendants.

V. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1086. **Against Bank, Drawee having Certified.**

Form No. 293.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation, created by and under the laws of this state, organized pursuant to an act of the legislature entitled "An act to authorize the business of banking," passed ....., and the acts amending the same.

II. That on the ..... day of ....., 18..., at ....., one A. B. made his check, and directed it to the defendants, and thereby required them to pay this plaintiff, or order [or bearer], ... dollars, for value received; and delivered the same to this plaintiff [or, if payable to third party, state accordingly].

III. That on the ..... day of ....., 18..., at ....., the defendant, by its agent duly authorized thereto, in writing, accepted and certified the same to be good.

IV. That thereafter the same was duly presented for payment, but no part thereof was paid.

[DEMAND OF JUDGMENT.]

§ 1087. **Raised Check Certified.**—A bank, by certifying a check in the usual form, simply affirms the genuineness of the signature of the drawer, and that it has funds sufficient to meet it, and engages that they will not be withdrawn to the prejudice of the holder of the check, but does not warrant the genuineness of the body of the check.[1] Where a raised check had been certified and afterwards paid, the bank certifying and paying could recover back as for money paid by mistake.[2]

§ 1088. **Certified Check.**—The certifying of a check as "good" transfers the sum drawn for to the holder, and imports

[1] Marine National Bank v. The National City Bank, 59 N. Y. 67.
[2] Id.; and Security Bank v. National Bank, 67 N. Y. 458.

a promise to pay to him on demand. But the drawee can not set off a claim on the holder against the amount so transferred, and the maker of the check is not discharged.[1] Where a check dated January 10, 1866, was certified by the assistant cashier of defendant's bank, and was indorsed to W., December 1, 1865; March 7, 1866, the check was deposited with the plaintiff, who credited W. with the amount on their books; and the drawer of the check had not funds with defendants to meet it, either when it was certified, or when it was presented, it was held, that W., as he took a postdated check, had notice that the cashier was exceeding his authority in certifying it, and that plaintiffs took subject to the equities against W.[2]

CHAPTER III.

ON PROMISSORY NOTES, AND CERTIFICATES OF DEPOSIT.

§ 1089. Maker of Accommodation Note, having Paid it.

Form No. 294.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff made his promissory note, of which the following is a copy [copy of note].

II. That the plaintiff never received any consideration therefor, but that it was an accommodation note, made and given to the defendant, at his request, and upon his promise that he would pay it at maturity.

III. That as the plaintiff is informed and believes, the defendant thereafter and before its maturity negotiated it for value.

IV. That the defendant failed to pay the same at maturity, and the plaintiff paid it.

V. That defendant has not repaid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1090. Accommodation Maker as Plaintiff.—An accommodation maker or indorser is a surety and may sue as such

[1] Brown v. Leckie, 43 Ill. 497; Bickford v. First National Bank of Chicago, 42 Id. 238; Rounds v. Smith, Id. 245.

[2] Clark Nat. Bank v. Bank of Albion, 52 Barb. 592. As to authority of bank officers to accept and certify, see Willets v. Phœnix Bank, 2 Duer, 121; Farmers' Bank v. Butchers' and Drovers' Bank, 4 Id. 219; Claflin v. Farmers' and Citizens' Bank, 25 N. Y. 293; S. C., 24 How. Pr. 1.

to recover payments made by him.[1] If the accommodation maker was sued, the allegation may state that "the plaintiff was thereupon compelled, by suit brought against him by A. B., the holder, in the ..... court."[2]

§ 1091. **Coupons.**—Interest coupons to railroad bonds, payable to bearer at a specified time and place, are negotiable promises for the payment of money, and are subject to the same rules as other negotiable instruments. They are transferable by delivery, although detached from the bonds, and a purchaser in good faith, before maturity, from one who has stolen them, acquires a valid title.[3]

§ 1092. **Contingent Order.**—A contingent order is not negotiable.[4]

§ 1093. **Consideration.**—A complaint upon a promissory note need not aver that it was given for a consideration.[5] Section 3104 of the Civil Code of California is as follows: "The signature of every drawer, acceptor, and indorser of a negotiable instrument is presumed to have been made for a valuable consideration, before the maturity of the instrument, and in the ordinary course of business."

§ 1094. **Date.**—A negotiable instrument, may be with or without date, and with or without designation of the time or place of payment.[6] Any date may be inserted by the maker of a negotiable instrument, whether past, present or future, and the instrument is not invalidated by his death or incapacity at the time of the nominal date.[7]

§ 1095. **Filling Blanks.**—One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterwards, is liable on the instrument to an indorser thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form.[8]

§ 1096. **Joint Maker of a Note, having Paid it, against the Other, for Contribution.**

Form No. 295

[TITLE.]

The plaintiff complains, and alleges:

[1] Baker v. Martin, 3 Barb. 634; Neass v. Mercer, 15 Id. 318. For a form of complaint by accommodation maker, see Osgood v. Whittelsey, 10 Abb. Pr. 134.

[2] Packard v. Hill, 7 Cow. 442. And may recover the costs of suit: Baker v. Martin, 3 Barb. 634. But see Holmes v. Weed, 24 Barb. 546, which limits it to costs of default.

[3] Evertson v. Nat. Bank, 66 N. Y. 14.

[4] Kenny v. Hinds, 44 How. Pr. 7.

[5] Pinney v. King, 21 Minn. 514.

[6] Cal. Civil Code, sec. 3091.

[7] Cal. Civil. Code, sec. 3094.

[8] Cal. Civil Code, sec. 3125.

I. That on the ..... day of ....., 18..., at ....., this plaintiff and the defendant made their joint [or joint and several] promissory note in writing, of which the following is a copy [copy note].

II. That at the maturity of said note, the plaintiff was compelled to pay, and did pay, the same.

III. That no part thereof has been repaid to him.

[DEMAND OF JUDGMENT.]

§ 1097. By Indorser of Note, having Paid a Part.

Form No. 296.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day ....., 18..., at ....., the defendant made his promissory note, whereby he promised to pay to the order of the plaintiff, ... days after date, the sum of ..... dollars, for value received [or copy the note].

II. That thereafter, and before the maturity of said note, the plaintiff indorsed it and negotiated it for value.

III. That at the maturity it was presented for payment to the defendant [or allege excuse for non-presentment], but was not paid, whereof the plaintiff had due notice.

IV. That on the ..... day of ....., 18.., at ....., the plaintiff paid to one A. B., the holder thereof, the sum of ..... dollars, the amount due on said note.

V. That no part thereof has been repaid to the plaintiff.

[DEMAND OF JUDGMENT.]

§ 1098. **Accommodation Indorsers, Co-sureties.**—In an action by an indorser of a promissory note, who has paid the same, against a prior indorser, it is competent for defendant to prove by parol that all the indorsers were accommodation indorsers, and by agreement they were, as between themselves, co-securities.[1]

§ 1099. **Legal Owner.**—Where an indorser has paid the whole of a note, and become the legal owner of it, he may sue directly on the note.[2] But where he paid only a part, he must sue for the amount actually paid, as for money paid to the use of the drawer or first indorser.[3] But separate prior indorsers can not be joined as defendants in such an action.[4]

[1] Easterly v. Barber, 66 N. Y. 433.
[2] Baker v. Martin, 3 Barb. 634; Wright v. Butler, 6 Wend. 290.
[3] Wright v. Butler, Id. 284; Pownal v. Ferrand, 6 Barn. & Cress. 439; Dygert v. Gross, 9 Barb. 506.
[4] Barker v. Cassidy, 16 Barb. 177.

§ 1100. **Payee against Maker.**

Form No. 297.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of....., 18 ..., at ....., the defendant made and delivered to the plaintiff his promissory note of which the following is a copy [set out copy of note].

II. That he has not paid the same [except ..... dollars, paid on the ..... day of ....., 18 ...].[1]

[DEMAND OF JUDGMENT.]

§ 1101. **Certificate of Deposit.**—A certificate of deposit is on the same footing as a promissory note.[2] It changes the character of the maker from a custodian of the funds to that of a debtor;[3] and the brokers become liable to pay to the holder of the certificate on its presentation.[4] In an action by an indorsee on a certificate of deposit, presentation and demand must be alleged in the complaint.[5]

§ 1102. **Consideration.**—In a complaint on a promissory note it is not necessary that a consideration should be specially alleged. If there is no consideration, the defendant should set up the want of it as a defense.[6] Every note imports consideration.[7] An oral promise to convey land, in accordance with which the land is subsequently conveyed, is a sufficient consideration for a promissory note.[8] A covenant to convey is a good consideration for note for purchase money, although the payee of the note who had given the bond of conveyance had not the legal title, and could not convey it when the note became payable.[9] But paying part of a note when all is due is no consideration for an agreement to extend the time of payment.[10] Though the holder of a promissory note which proves to be void may in a proper case recover on the consideration for which the

[1] It is always advisable in pleading under a code to set out the instrument sued upon in the body of the complaint, as thereby any mistake as to the legal effect of the instrument will be avoided, and besides it will then not be necessary to prove the execution of the instrument, unless the execution is specifically denied under oath. The following allegation, however, is good, and may be substituted for the first paragraph in the above form: I. That on the ..... day of ....., 18 ..., at ....., the defendant made and delivered to the plaintiff his promissory note of that date, and thereby promised to pay to the plaintiff, or his order, in ..... days after date, the sum of ..... dollars.

[2] Welton v. Adams, 4 Cal. 37; Brummagim v. Tallant, 29 Id. 503.

[3] Naglee v. Palmer, 7 Cal. 543.

[4] McMillan v. Richards, 9 Cal. 365; see Civil Code, sec. 3095.

[5] Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377.

[6] Winters v. Rush, 34 Cal. 136.

[7] Bank of Troy v. Topping, 13 Wend. 557; Goshen Turnpike Co. v. Hurtin, 9 Johns. 217; Prindle v. Caruthers, 15 N. Y. 425.

[8] Kratz v. Stocke, 42 Mo. 351.

[9] Holy v. Rhodes, 2 Cranch C. C. 245; Lane's Adm'r v. Dyer, Id. 349.

[10] Lieuing v. Gould, 13 Cal. 598.

note was intended to be given, he can not do so unless the pleading set out such consideration.[1] Where an agreement of sale of personal property was signed by the purchaser only, who gave his note for the price, it might be inferred from the evidence of performance on seller's part so as to constitute a consideration for the note.[2] As the statute makes a promissory note *prima facie* evidence of indebtedness, though no consideration be expressed,[3] it is not necessary to add an averment that the defendant is indebted.[4]

§ 1103. **Copy of Note.**—A complaint against a maker is sufficient where it sets forth a copy of the note, and alleges that a specified sum is due thereon from defendant to plaintiff, although the note is by its terms payable to a third person, and there is no allegation of an indorsement by him.[5]

§ 1104. **Date—Variance.**—It is of n oconsequence whether the date of a promissory note be at the beginning or end of it.[6] But as a variance would be immaterial,[7] the plaintiff may transfer the allegation of time and place into one of date, thus: That the defendant, by his promissory note, dated on....., at ....., promised, etc. A variance of one month in the time of a note described, was disregarded as immaterial, the defendant not having been misled.[8] Where no time of payment is named, the note is due immediately,[9] and interest runs from date and without demand. On such a note a count stating no time of payment is good.[10]

§ 1105. **Delivery.**—It is not necessary to add an averment of delivery where the plaintiff is the payee. "Made" imports delivery.[11] Indorsement likewise imports delivery.

§ 1106. **Demand.**—No previous demand is necessary to maintain an action on a note payable on demand.[12] The action itself is a sufficient demand, and if there were no days of grace allowed, the note would be payable immediately after delivery.[13] But an indorser after maturity is entitled to demand and notice

[1] Wayman v. Torreyson, 4 Nev. 124.
[2] Weightman v. Caldwell, 4 Wheat. 85.
[3] Stewart v. Street, 10 Cal. 372.
[4] Connecticut Bank v. Smith, 9 Abb. Pr. 168.
[5] Prindle v. Caruthers, 15 N. Y. 425; Continental Bank v. Bramhall, 10 Bosw. 595; Raynor v. Hoagland, 39 N. Y. S. C. 11.
[6] Sheppard v. Graves, 14 How. U. S. 505
[7] Bentzing v. Scott, 4 Carr. & P. 24.
[8] Trowbridge v. Didier, 4 Duer, 448.
[9] Thompson v. Ketcham, 8 Johns. 189; Gaylord v. Van Loan, 15 Wend. 308; 6 Barb. 662; Bell v. Sackett, 38 Cal. 407.
[10] Herrick v. Bennett, 8 Johns. 374.
[11] Churchill v. Gardner, 7 T. R. 596; Russell v. Whipple, 2 Cow. 536; Prindle v. Caruthers, 15 N. Y. 425; Keteltas v. Myers, 19 Id. 231.
[12] Ziel v. Dukes, 12 Cal. 482; Story on Prom. Notes, sec. 29.
[13] Bell v. Sackett, 38 Cal. 407.

of non-payment before he is liable to pay.[1] As against a maker or acceptor of a note drawn payable at a particular bank or place, it is not necessary to aver that a demand was made at place specified.[2] But with the indorser the rule is different.[3] Where a note is payable in installments due at different times, and demand on the maker is not made till the last installment falls due, and then demand is made for the whole amount, the demand is good for the purpose of charging the indorser for the last installment.[4]

§ 1107. **Indorsement.**—If a person who is not a party to a promissory note indorse his name upon it in blank, with intent to give it credit, the holder may write over it an engagement to pay it in case of insolvency of the maker, and if such insolvency be shown no allegation of demand or notice is necessary.[5] A parol agreement between two indorsers at the time of indorsement, to divide the loss between them in the event of non-payment, is a collateral agreement, founded on sufficient consideration, and will support an action.[6] Payment of a note by an indorser after protest, is a good consideration for an *assumpsit* on the part of the maker, for the note, with cost of protest.[7]

§ 1108. **Execution.**—The general rule of law requiring proof of the title of the holders of a note, may be modified by a rule of court dispensing with proof of the execution of the note, unless the party shall annex to his plea an affidavit that the note was not executed by him.[8]

§ 1109. **Foreign Coin Note.**—Where a note is payable in foreign coin, the value of such coin must be averred.[9]

§ 1110. **Forms of Notes.**—A written promise to pay to "A. B.," without adding "or order," or "or bearer," is a promissory note within the statute;[10] but is not negotiable under the civil code of California. An instrument in the following form: "Troy, August 4, 1846. I hereby agree to pay Miss A. Y. twenty dollars per month during her natural life, for her attention to my son J. S. M. [Signed] B. M."—is not a promissory note.[11] Such

[1] Beebe v. Brooks, 12 Cal. 308.
[2] Silver v. Henderson, 3 McLean, 165; Payson v. Whitcomb, 15 Pick. 212.
[3] United States Bank v. Smith, 11 Wheat. 171.
[4] Eastman v. Turman, 24 Cal. 379.
[5] Offut v. Hall, 1 Cranch C. C. 504; Id. 572.
[6] Phillips v. Preston, 5 How. (U. S.) 278.
[7] Morgan v. Reintzell, 7 Cranch, 273.
[8] Mills v. Bank of United States, 11 Wheat. 431; see Cal. Code C. P., sec. 447.
[9] United States v. Hardyman, 13 Pet. 176; see sec. 3238 Civil Code.
[10] Burchell v. Slocock, 2 Ld. Raym. 1545; Smith v. Kendall, 6 T. R. 123; Downing v. Blackenstoes, 3 Cai. 137; Goshen & Minisink Turnpike Co. v. Hurtin, 9 Johns. 217.
[11] Spear v. Downing, 12 Abb. Pr. 437.

an instrument expresses no consideration, since it affords no presumption that the services referred to were rendered in pursuance of a previous request of the promisor, or that they were beneficial to him.[1] On a promise to pay "as soon as able," a judgment and execution are the best test of defendant's ability to pay.[2]

§ 1111. **Interest.**—If the holder of a promissory note fill in the rate of interest left blank by the maker, he can collect only legal interest; but an innocent holder from him can collect the interest as filled in.[3] Interest need not be averred. It can be recovered as damages.[4] The filling of a blank with the rate of interest does not thereby vitiate the note.[5] If the original note offered in evidence contains an abbreviation for the word "administratrix," and specifies the rate of interest in figures only, and the copy in the complaint gives the word in full, and states the rate of interest in words as well as figures, the variance is immaterial.[6]

§ 1112. **Pleading, Legal Effect.**—A note may be set out according to its legal effect.[7] The difference between a note payable on a certain day and one payable on or before such a day is material when described according to its legal effect.[8] A complaint pleading a note according to its legal effect must state a payee, otherwise it seems it is demurrable.[9]

§ 1113. **Liability of Maker.**—The maker is bound by the contract which he signs, whatever his motive or purpose in signing it may be, and can not vary the legal effect of his obligation by parol.[10] A promissory note is neither an account, unliquidated demand, nor a thing in action not arising out of contract.[11]

§ 1114. **Lost Paper.**—In case of the loss or destruction of negotiable paper, as a note or certificate of deposit, the plaintiff can not maintain an action without first indemnifying the maker against all future claims upon it.[12] And no distinction exists between a note destroyed and one lost; but in either case a bond of indemnity need not be tendered or filed with the complaint, but may be tendered upon the trial.[13]

[1] Spear v. Downing, 12 Abb. Pr. 437.
[2] Cecil v. Welsh, 2 Bush (Ky.), 168.
[3] Fisher v. Dennis, 6 Cal. 577.
[4] Chinn v. Hamilton, Hempst. 438.
[5] Fisher v. Dennis, 6 Cal. 577; Visher v. Webster, 8 Id. 109; see Humphreys v. Crane, 5 Id. 173; see *ante*, Bills of Exchange.
[6] Corcoran v. Doll, 32 Cal. 82.
[7] Drake v. Fisher, 2 McLean, 69; Spaulding v. Evans, Id. 139; compare Turner's Ex'rs v. White, 4 Cranch C. C. 465.
[8] Kikindal v. Mitchell, 2 McLean, 402.
[9] White v. Joy, 13 N. Y. 83.
[10] Aud v. Magruder, 10 Cal. 282.
[11] Priest v. Bounds, 25 Cal. 188.
[12] Welton v. Adams, 4 Cal. 37; Price v. Dunlap, 5 Id. 483.
[13] Randolph v. Harris, 28 Cal. 561; but see Wright v. Wright, 54 N. Y. 437.

§ 1115. **Maturity.**—It is not necessary to show that the note was due before the commencement of the action,[1] nor that the time for payment has elapsed.[2] An allegation that a note was given to provide for payment does not mean a present payment, but a provision for a future payment.[3]

§ 1116. **New Promise.**—Where a creditor sues after the statute of limitations has run upon the original contract, or after a discharge in insolvency, his cause of action is not the original contract, but the new promise; and in such case the new promise must be pleaded.[4]

§ 1117. **Non-payment.**—In a complaint upon a promissory note, an allegation of its non-payment is material, and if omitted, the complaint is demurrable. The averment that there is a certain amount due upon the note is insufficient, being a statement of a mere conclusion of law.[5] An allegation in the complaint that "no part of said note, principal or interest, has been paid," is a sufficient averment of a breach.[6]

§ 1118. **Note Held Adversely.**—A party who claims to be the owner of a promissory note, which is at the time in the possession of another claiming title thereto, can not maintain an action thereon; the maker being entitled to have it delivered up, and canceled upon paying it. The title to the note could not be settled in such suit.[7]

§ 1119. **Negotiability.**—In Indiana a promissory note made payable at a bank in that state having an actual existence, is negotiable; if not so payable, it is assignable, but is not commercial paper;[8] and in an action brought thereon by a *bona fide* holder, the maker is not estopped from showing that there was no such bank in existence.[9] A promissory note providing that it may be paid at any time before maturity, and that interest at eighteen per cent per annum shall be deducted till due, is not negotiable.[10] A note may be negotiable if payable certainly at a fixed time, although subject to a contingency under which it may become due earlier.[11] The current rate of exchange must be proved by extrinsic evidence; therefor a promise to pay a

[1] Smith v. Holmes, 19 N. Y. 271; Maynard v. Talcott, 11 Barb. 569.

[2] Peets v. Bratt, 6 Barb. 662; Maynard v. Talcott, 11 Id. 569; Smith v. Holmes, 19 N. Y. 271; Ketcltas v. Myers, Id. 231.

[3] Bates v. Rosenkrans, 23 How. Pr. 98.

[4] McCormick v. Brown, 36 Cal. 180, and Chabot v. Tucker, 39 Id. 434; overruling Smith v. Richmond, 19 Id. 476.

[5] Frisch v. Caler, 21 Cal. 71.

[6] Jones v. Frost, 28 Cal. 245.

[7] Crandall v. Schroeppel, 1 Hun, 557.

[8] King v. Vance, 46 Ind. 246.

[9] First Nat. B'k v Grindstaff, 45 Ind. 158.

[10] Way v. Smith, 111 Mass. 523.

[11] Ernst v. Steckman, 74 Pa. St. 13.

sum certain with the current rate of exchange added, is not a negotiable note.[1]

§ 1120. **Allegation of Ownership.**—The averment in the complaint that plaintiff is the owner of the note and mortgage in suit, is a sufficient answer to a demurrer, on the ground that it does not appear by the complaint that the plaintiff is the holder of the note.[2] That the defendant made his promissory note in writing, and thereby "promised to pay plaintiff," is sufficient to show that plaintiff is owner of the note.[3] The averment that the plaintiff was owner of the note is not the averment of an issuable fact. It is the allegation of a legal conclusion, and is immaterial, and should be omitted.[4] For the plaintiff may recover without being the holder, as where the note has been destroyed or lost.[5] Or, as when the note is in possession of defendant.[6] In such cases he may sue if he is the real party in interest, trustee of an express trust, or person authorized by statute.[7]

§ 1121. **Parties.**—Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.[8]

§ 1122. **Presentment.**—In an action against the maker of a note, or the acceptor of a bill of exchange, in which the place of payment is fixed, it is not necessary to aver presentment at that place and refusal to pay.[9] But the averment of presentment and demand of note at the place specified is necessary to charge an indorser.[10]

§ 1123. **Real Party in Interest.**—If the holder of a promissory note legally has its possession, and is entitled to receive its payment, he is the proper plaintiff in its prosecution, and this without reference to the party who may ultimately be entitled to a participation in its proceeds.[11]

[1] Lowe v. Bliss, 24 Ill. 168; Hill v. Todd. 29 Ill. 101.

[2] Rollins v. Forbes, 10 Cal. 300.

[3] Moss v. Cully, 1 Or. 147.

[4] Poorman v. Mills, 35 Cal. 118; approving Wedderspoon v. Rogers, 32 Cal. 569; see. also. Flammer v. Kline, 9 How. Pr. 216; Bank of Lowville v. Edwards, 11 Id. 217; Mitchell v. Hyde, 12 Id. 460; Keteltas v. Myers, 19 N. Y. 231; Farmers' etc. Bank v. Wadsworth, 24 Id. 547; Niblo v. Harrison, 7 Abb. Pr. 447; Skinner v. Stuart, 13 Id. 249; Ohio etc. Co. v. Goodin, 1 Handy, 31.

[5] Supervisors v. White, 30 Barb. 72; Des Arts v. Leggett, 16 N. Y. 582.

[6] Smith v. McClure. 5 East, 476; Selden v. Pringle, 17 Barb. 468.

[7] Root v. Price, 22 How. Pr. 372; Butterfield v. McOmber, Id. 150. See, on this subject, "Pleadings."

[8] Cal. Code C. P., sec. 383.

[9] Montgomery v. Tutt, 11 Cal. 307.

[10] Gay v. Paine. 5 How. Pr. 107; Ferner v. Williams. 14 Abb. Pr. 215; U. S. Bank v. Smith, 11 Wheat. 171; Woodworth v. Bk. of America, 19 Johns. 419.

[11] Williams v. Brown, 2 Keyes, 486. Consult "Parties."

§ 1124. **Rate of Interest.**—On a note made in another state, and bearing higher interest than is lawful by the law of the forum, the foreign statute need not be pleaded, for the court may presume that the common law, by which any rate of interest is lawful, prevails in the law of the place of the contract.[1]

§ 1125. **Substitute Notes.**—A complaint is not deficient, in stating a cause of action, because after alleging valid notes, it states that they were given up and canceled on the giving by defendant of new notes, in which usurious interest was reserved for the extension of time. The plaintiff may in such a case recover upon the original notes.[2]

§ 1126. **Value Received.**—The legal effect of a promissory note is the same with or without the words "value received."[3]

§ 1127. **Verbal Conditions.**—In Indiana,[4] it was held that a verbal condition could not be annexed to a promissory note; but in New York[5] it was held that a bill or note may be delivered to the person beneficially interested therein, upon conditions the observance of which is essential to its validity; and the annexing of such conditions to the delivery is not an oral contradiction to the written obligation, though negotiable, as between the parties to it or others having notice.

§ 1128. **Void Notes.**—Notes given for a gaming consideration are valid in the hands of a *bona fide* indorsee.[6] A negotiable note, the consideration of which is against public policy, becomes valid in the hands of an innocent holder before maturity.[7] A promissory note, given for the release of property seized for a toll imposed by the state law on lumber floated down a stream from that state into another, is void for want of consideration.[8]

§ 1129. **When Due.**—When days of grace are allowed, the day on which the note became due is excluded from the computation.[9] And the maker has all of the last day on which his note falls due to pay it, and suit commenced thereon on that day is premature.[10] A promissory note payable generally, without specifying any time, is due immediately.[11]

[1] Buckinghouse v. Gregg, 19 Ind. (Kerr) 401.
[2] Winsted Bank v. Webb, 39 N. Y. 325.
[3] People v. McDermott, 8 Cal. 288.
[4] Potter v. Earnest, 45 Ind. 416.
[5] Benton v. Martin, 52 N. Y. 570.
[6] Haight v. Joyce, 2 Cal. 64.
[7] Thorne v. Yontz, 4 Cal. 321.
[8] C. R. L. Co. v. Patterson, 33 Cal. 334
[9] Story on Prom. Notes, sec. 217; Chit. on Bills, 403; Bailey on Bills, 245.
[10] Wilcombe v. Dodge, 3 Cal. 260; see Davis v. Eppinger, 18 Id. 381; Bell v. Sackett, 38 Id. 407.
[11] Holmes v. West, 17 Cal. 623. See *ante*, "Bills of Exchange."

§ 1130. **The Same—On Two Notes, One being Partly Paid.**

Form No. 298.

[TITLE.]

The plaintiff complains, and alleges:

First.—For a first cause of action:

I. That on the ..... day of ...., 18 .., at ....., the defendant made and delivered to the plaintiff his promissory note, of which the following is a copy [insert copy of note].

II. That he has not paid the same [except ..... dollars, paid on the ..... day of ....., 18...].

Second.—For a second cause of action:

I. That on the ..... day of ....., 18 .., at ....., the defendant made and delivered to the plaintiff his promissory note, of which the following is a copy [insert copy of the note].

II. That he has not paid the same, nor any part thereof.

Wherefore the plaintiff demands judgment against the defendant for the sum of [aggregate principal], with interest on ..... dollars thereof, from the ..... day of ....., and with interest on ..... dollars thereof, from the ..... day of ....., and costs of suit.[1]

§ 1131. **Causes of Action.**—It would seem that several notes are several causes of action, and must be separately stated.[2] But it appears the contrary is held in Iowa.[3]

§ 1132. **Several Notes given as Security.**

Form No. 299.

[TITLE.]

The plaintiff complains, and alleges:

I. That upon the ..... day of ....., 18..., the defendants were indebted to the plaintiffs in the sum of ..... dollars.

II. That to secure the payment of that sum, the defendants made their promissory notes, copies of which are hereto annexed, marked Exhibits "A," "B," and "C."

III. That at the same time the defendants agreed with the plaintiffs, in writing, that in case of default in the payment of any of the said notes at any time when the same should become due and payable, the whole amount of said sum of ..... dollars and interest, then remaining unpaid, should forthwith, at the option of the plaintiffs, become at once due and payable.

[1] If preferred, and in fact it is the better practice, a copy of the notes may be set out, in pleading on written instruments. By doing so, the genuineness and due execution of the instrument are deemed admitted, unless the answer denying the same be verified: Cal. Code C. P., sec. 447.

[2] Van Namee v. Peoble, 9 How. Pr. 198; Dorman v. Kellam, 4 Abb. Pr. 202.

[3] Merritt v. Nihart, 11 Iowa, 57.

IV. That the first of said notes became due and payable on the ..... day of ....., 18...

V. That defendants have not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copies of notes marked Exhibits "A," "B," "C."][1]

§ 1133. On a Note Signed by an Agent.

Form No. 500.

[TITLE.]

The plaintiff complains, and alleges:

I. That on ..... day of ...., 18.., at ....., the defendant, by his agent [or attorney in fact], duly authorized thereto, made his promissory note, and thereby promised to pay to the plaintiff [or his order] ..... dollars, ... months after said date.

II. That he has not paid the same [except ..... dollars, paid on the ..... day of ....., 18..].

[DEMAND OF JUDGMENT.]

§ 1134. **Action on Note Executed by Agent.**—A complaint averring that the principal by his agent, made a promissory note, is good.[2] But it has been held that in the common counts it is not necessary to state that the defendants acted by an agent, but that an averment that the act was the act of the defendants would be supported by proof of the act of their agent.[3] Where the pleading shows, by setting out a copy of the instrument, that the act was by an agent, his authority should be averred.[4] The ratification by a principal, of an unauthorized act of an agent, has a retroactive efficacy, and being equivalent to an original authority, an allegation of due authority is sustained by proof of such ratification.[5]

§ 1135. On a Note made by Partners.

Form No. 501.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the defendants under their firm name of A. B. & Co., made and delivered to the plaintiff their promissory note, of which the following is a copy [insert copy of note].

[1] It is not necessary to allege, "agreed to deliver and did make and deliver to the plaintiffs," because the copies are annexed, showing possession in the plaintiff of the said notes, and because "made" implies delivery: See Brown v. South. Mich. R. R. Co., 6 Abb. Pr. 237.

[2] Childress v. Emory, 8 Wheat. 642; Sherman v. Comstock, 2 McLean, 19; compare Wilson v. Porter, 2 Cranch C. Ct. 458.

[3] Sherman v. N. Y. Central R. R. Co., 22 Barb. 239.

[4] McCullough v. Moss, 5 Den. 567.

[5] Hoyt v. Thompson's Ex'rs, 19 N. Y. 207.

II. That they have not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1136. **The Same—How Alleged.**—Signature of a note, in the name of a firm, by a partner, may be alleged as made by the firm. It is sufficient to set forth a writing according to its legal effect.[1] All the joint makers of a promissory note are principals;[2] and suit must be brought against them all.[3]

§ 1137. **Another Form, Averring Partnership.**

Form No. 302.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of making the note hereinafter mentioned, the defendants were partners doing business at ....., under the firm name of A. B. & Co.

II. That on the ..... day of ....., 18 ..., at ....., the defendants, under their said firm name, made their promissory note, and thereby promised to pay the plaintiff..... dollars ..... months after said date.

III. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1138. **Allegation by Payee as Receiver against Partners.**

Form No. 303.

That heretofore the defendants under their firm name of A. B. & Co., made their promissory note, and thereby promised to pay to the plaintiff, as such receiver [or to his order], ... dollars ..... on the ..... day of ....., 18...

§ 1139. **As Such Receiver.**—The act should be averred as that of the party as such receiver.[4] Where, however, the plaintiff's character is once sufficiently stated, the word "plaintiff" in subsequent parts of the pleading requires no addition to the description.

§ 1140. **Partnership.**—An averment that the note was indorsed by the defendants under a certain name and description is sufficient.[5] Where the fact of partnership is likely to be drawn in question, it is better to aver the fact distinctly.[6] The denial of the copartnership of the plaintiffs is immaterial unless the defendant denies the execution of the note.[7]

[1] Manhattan Co. v. Ledyard, 1 Cai. 192; Vallett v. Parker, 6 Wend. 615; see Bass v. Clive, 4 Camp. 78.

[2] Shriver v. Lovejoy, 32 Cal. 574.

[3] Woodworth v. Spafford, 2 McLean, 168; Keller v. Blasdel, 1 Nev. 491.

[4] Merritt v. Seaman, 6 N. Y. 168, and cases there cited. This clause was contained in the complaint in Smith v. Levinus, 8 Id. 472; and see Gould v. Glass, 19 Barb. 179; Sheldon v. Hoy, 11 How. Pr. 11.

[5] Kendall v. Freeman, 2 McLean, 189; Davis v. Abbott, Id. 29.

[6] Oechs v. Cook, 3 Duer, 161.

[7] Whitwell v. Thomas, 9 Cal. 499.

§ 1141. **Sight Note, Allegation of.**

Form. No. 304.

That on the ..... day of ....., 18..., at ..... said note was duly presented to the defendant [maker], with notice that payment was required according to the terms thereof.[1]

§ 1142. **On a Note Wrongly Dated.**

Form No. 305.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ...., 18..., at ....., the defendant made and delivered to the plaintiff his certain promissory note, of which the following is a copy [insert copy of note]; that by inadvertence or mistake said note was dated as of the ..... day of ....., instead of the said ..... day of ..... [the date of delivery].

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1143. **Domestic Corporation, Payee, against a Foreign Corporation.**

Form No. 306.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation of plaintiff under the act as in form No. 75.]

II. That the defendant is a corporation, chartered by and under the laws of the state of Nevada, and pursuant to an act of the legislature of said state [title of act], passed [date of enactment].

III. That on the ..... day of ....., 18..., at ...., the defendant, as such corporation, by one A. B., its agent [or attorney in fact], made its promissory note, and thereby promised to pay to the plaintiff, under its corporate name of E. F. [or to their order], ... dollars, ... months after said date. A copy of said note is hereto attached, marked "Exhibit A," and made part of this complaint.

IV. That the same has not been paid nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1144. **Form of Note.**—"The president, by the order of the board of the A. B. Co, promises to pay," etc., signed "C. D., Pres., E. F.," et al., binds the individuals signing, and not the corporation.[2] "The president and directors of the A. B. Co. will pay," etc., signed "C. D., Pres., E. F.," et al., does not bind the individuals signing, but only the corporation.[3]

[1] Sight is a condition precedent: 2 Ch. Pl. 281.

[2] Caphart v. Dodd, 3 Bush, 584.

[3] Yowell v. Dodd, 3 Bush, 581.

§ 1145. **Insurance Company.**—In an action by the indorsees against the maker of a note, of which an insurance company were the payees and indorsers, the complaint showed that the defendant made his note to the Atlas Mutual Insurance Company, or order; and that the company indorsed it, and transferred and delivered it to the plaintiffs, but it did not expressly aver that the transfer was made pursuant to a resolution of the board of directors; it was held sufficient on demurrer. If such resolutions were necessary, it was implied and provable under the allegation that the company transferred the note. But that is not true if the transfer was not made by the proper officer, and according to law.[1]

§ 1146. **Power of Corporation to make Note.**—In the absence of any prohibitory statute, a corporation may give a note for a debt contracted in the course of its legitimate business.[2] *Prima facie*, a corporation has power to take a promissory note.[3] Where there is nothing on the face of the note to show that it was issued contrary to law, or that the consideration or the purpose was illegal, the presumption is that it was given for a lawful purpose.[4]

§ 1147. **Payee against Surviving Maker.**

Form No. 307.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of the making the note hereinafter mentioned, the defendant and one A. B. were partners, doing business under the firm name of A. B. & Co.

II. That on the ..... day of ....., 18..., at ....., they made, under their said firm name, their promissory note of that date, of which the following is a copy [insert copy of note].

III. That on the ..... day of ....., 18..., at ....., said A. B. died, leaving the defendant the sole surviving partner of said firm.

IV. That said note has not been paid, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1148. **When Action Lies—Allegations.**—A joint action at law can not be maintained against the survivor and administrator of the deceased maker of a promissory note.[5]

[1] Nelson v. Eaton, 15 How. Pr. 305.
[2] Mott v. Hicks, 1 Cow. 513, 532; Moss v. Oakley, 2 Hill, 665; Attorney General v. Life and Fire Insurance Co., 9 Paige Ch. 470; Kelley v. Mayor etc. of Brooklyn, 4 Hill, 263; McCullough v. Moss, 5 Denio, 567.
[3] Mutual Benefit Life Insurance Co. v. Davis, 12 N. Y. 569.
[4] Safford v. Wyckoff, 4 Hill, 442; Barker v. Mechanic's Fire Ins. Co., 3 Wend. 94.
[5] Maples v. Geller, 1 Nev. 233.

The rule in equity has been that the estate of a deceased joint obligor could only be reached when the survivor was bankrupt or insolvent.[1] Where an action is brought against two, as the survivors of one who executed a joint note, it is not essential to allege in the declaration that the note was not paid by the deceased.[2]

§ 1149. **Payee against Maker and Indorser, on Note Taken on the Faith of the Indorsement.**

Form No. 308.

[TITLE]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant, A. B., made his promissory note, and thereby promised to pay to the order of the plaintiff, at ....., the sum of ..... dollars, ... months after said date.

II. That the defendant, C. D., indorsed said note, when said A. B. delivered the same to plaintiff.

III. That said note at maturity was presented to said A. B. for payment, and payment thereof demanded, but the same was not paid; of all which due notice was given to the defendant, C. D.

IV. That said note was made by the defendant A. B., and indorsed by the defendant C. D., for the purpose of paying for [state what], on the credit of such indorsement; that the defendant C. D. indorsed the same for the purpose of procuring for the said maker a credit with the plaintiff, knowing that it would be so applied, and that said note was so passed and so indorsed by the defendant with his privity, to the plaintiff in payment for [state what].

V. That no part thereof has been paid.[3]

[DEMAND OF JUDGMENT.]

§ 1150. **First Indorsee Against Maker.**

Form No. 309.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at....., the defendant, by his promissory note, promised to pay to the order of one C. D., ... dollars.

II. That the said C. D. indorsed the same to the plaintiff.

[1] Maples v. Geller, 1 Nev. 233.

[2] Silver v. Henderson, 3 McLean, 165; but see Winter v. Simonton, 3 Cranch C. Ct. 62.

[3] See as to the authorities sustaining a form similar to this, Moore v. Cross, 19 N. Y. 227. For a complaint on instrument for payment of money only: Held sufficient against makers, and insufficient against indorsers, in Conkling v. Gandall, 1 Keyes, 228.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT]

§ 1151. **Consideration.**—When the consideration passing between the indorsee and his indorser is not equal to the amount of the paper, the indorsee as against his indorser can recover only the amount of consideration he has paid.[1] The indorsement, as well as the making of a note, imports a consideration.[2] The phrase, in a declaration on a note, that the plaintiff received it "before maturity, *bona fide*, and in due course of trade," means that he took it for value.[3]

§ 1152. **Indorsement by a Firm.**—An indorsement or signature of a note, in the name of a firm, by a partner, may be alleged as made by the firm. It is sufficient to set forth a writing according to its legal effect.[4] So, also, of joint makers not alleged to be partners.[5] It is sufficient in such cases to allege, generally, that M. N. & Co. indorsed it.[6]

§ 1153. **Owner.**—The holder of negotiable paper indorsed before maturity, is supposed to be the *bona fide* owner of the same, and all intendments are in his favor.[7] Nor is it necessary that he should show how he became possessed of the note.[8] His right to maintain the action can not be questioned on the ground that the note belongs to a third party, except defendant pleads payment to or offset against that party.[9] So, it has been decided that the possession obtained before or after maturity is *prima facie* evidence of ownership.[10] It is no objection to a recovery that title be shown out of the payee by special indorsements, without any retransfer from the last indorsee, if there be proof that the indorsees had no interest in it.[11] An allegation that the plaintiff (indorsee) is owner, or owner and holder, is unnecessary, since, when title is shown, a denial that he is the lawful owner and holder, is frivolous.[12]

[1] Coye v. Palmer, 16 Cal. 158.

[2] Hughes v. Wheeler, 8 Cow. 77; Cruger v. Armstrong, 3 Johns. Cas 5; Conroy v. Warren, Id. 259; Safford v. Wyckoff, 4 Hill, 442; Nelson v. Cowing, 6 Id. 336; Wheeler v. Guild, 20 Pick 550; Collins v. Martin, 1 Bos. & P. 648; Luning v. Wise, 1 West Coast Rep. 138.

[3] Miller v. Mayfield, 37 Miss. 688.

[4] Manhattan Co. v. Ledvard, 1 Cai. 192; S. C., Col. & C. Cas. 226; Vallett v. Parker, 6 Wend. 615; Bass v. Clive, 4 Camp. 68.

[5] Mack v. Spencer, 4 Wend. 411.

[6] Cochran v. Scott, 3 Wend. 229; Bacon v. Cook, 1 Sandf. 77.

[7] Palmer v. Goodwin, 5 Cal. 458; Himmelmann v. Hotaling, 40 Id. 111.

[8] Id.

[9] Price v. Dunlap, 5 Cal. 483.

[10] McCann v. Lewis, 8 Cal. 246.

[11] Nagle v. Lyman, 14 Cal. 450.

[12] Catlin v. Gunter, 1 Duer, 253; Fleury v. Roget, 5 Sandf. 646; Poorman v. Mills, 35 Cal. 118; Felch v. Beaudry, 40 Id. 439.

§ 1154 **The Same, against First Indorser.**

Form No. 316.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to the plaintiff a promissory note, made [or purporting to have been made] by one A. B., on the ..... day of ....., 18..., at ....., to the order of the defendant to the sum of ..... dollars.

II. That on the ..... day of ....., 18..., the same was presented to the said A. B. for payment, and payment thereof demanded, but the same was not paid [or state facts excusing want of presentment].

III. That due notice thereof was given to the defendant.

IV. That he has not paid the same or any part thereof.

[DEMAND OF JUDGMENT.]

§ 1155. **Accommodation Indorsement.**—Where a promissory note was indorsed by a third person before delivery to the payee, it was held that such indorsement was *prima facie* an accommodation to the payee, but proof that his design was to become a surety or guarantor would make him liable to the payee.[1] Where a promissory note made payable to S., and previous to its delivery to payee was indorsed for the accommodation of maker by H. and brother, and defendant, upon agreement that each would become surety if the other would, they were guarantors jointly and not severally liable.[2] To create a several liability, express words are necessary.[3]

§ 1156. **Demand, how Made and Alleged.**—Payment of the note must be first properly demanded of the makers, and due notice given to the indorser, before any legal liability attaches to the latter; and it is incumbent upon the pleader to state these facts.[4] That as against the indorser, an averment of demand at the place designated is deemed necessary.[5] If there are stated business hours at the place where it is made payable, presentment and demand must be made within those hours.[6] If a promissory note, payable on demand, or at sight, without interest, is not duly presented for payment within six months from its date, the indorsers thereof are exonerated, unless such presentment is excused.[7] But if payable at sight or on demand with interest, mere delay in presenting does not

[1] Clarke v. Smith, 2 Cal. 605.
[2] Brady v. Reynolds, 13 Cal. 31.
[3] Id.
[4] Conklin v. Gandall, 1 Keyes, 228
[5] Bank of United States v. Smith, 11 Wheat. 171. See Civil Code, sec. 3131.
[6] McFarland v. Pico, 8 Cal. 626.
[7] California Civil Code, sec. 3248.

exonerate any party thereto.[1] The failure to make presentment and demand would not discharge the debt, but would only affect the question of costs and damages.[2] In an action against the indorser of a bill or note, an allegation of a demand in general terms, "although often requested," etc., is good after verdict.[3] But if the note was made payable at a particular place, an allegation as in preceding form will be sufficiently specific averment of demand and notice. The contract of the indorser of a promissory note is a written one, and his liability a conditional one, to pay upon a proper demand and notice,[4] upon a demand upon the maker made within a reasonable time, and that in the event of his failure to do so, the indorser will pay.[5] And the contract can not be changed from a conditional to an absolute contract by parol evidence.[6]

§ 1157. **Demand and Notice, Allegation of Excuse for Om ssion of.**—An express waiver of notice of non-payment is sufficient excuse of demand and notice of non-payment.[7] And this may be done by an agent of the indorser, and a verbal waiver of demand, or of demand and notice, may be proved.[8] But the declaration of the indorser, made to a third person, "that notice not having been given at the proper time would make no difference to him, and that he would do what was right," is not a waiver.[9] Where payment by the maker to the indorser is relied upon as an excuse, it must be payment directly and specifically for the note, not as security for transactions in the aggregate.[10] If the waiver was before maturity, it operates as an estoppel to the indorser from denying that demand was made and notice given, and evidence of such waiver is admissible under the averment of demand and notice.[11]

§ 1158. **Indorsement, Averment of.**—An averment in the declaration that the note was indorsed by the defendants under a certain name and description, is sufficient. Where a contract shows a joint liability, it is unnecessary to allege a partnership.[12] The fact of the indorsement only need be pleaded to show title in the plaintiff, and an averment that the plaintiff is the owner

[1] Id., secs. 3214, 3217.
[2] Montgomery v. Tutt, 11 Cal. 307.
[3] Lefflingwell v. White, 1 Johns. Cas 99.
[4] Goldman v Davis, 23 Cal. 256.
[5] Keyes v. Fenstermaker, 24 Cal. 329.
[6] Goldman v. Davis, 23 Cal. 256.
[7] Matthey v. Gally, 4 Cal. 62; Minturn v Fisher, 7 Id. 573.
[8] See Mills v. Beard, 19 Cal. 158; see also Drinkwater v. Tebbetts, 17 Me. 16, where notice was waived in writing.
[9] Olendorf v. Swartz, 5 Cal. 480.
[10] VanNorden v. Buckley, 5 Cal. 283.
[11] Holmes v. Holmes, 9 N. Y. 525, Coddington v. Davis, 1 N. Y. 186; see Civil Code, sec. 3156.
[12] Kendall v. Freeman, 2 McLean, 186; Davis v. Abbott, Id. 29.

and holder is a conclusion of law, and need not be pleaded.[1] Where an indorsement upon a promissory note was made, not by the payee, but by persons who did not appear to be otherwise connected with the note, and the note thus indorsed was handed to the payee before maturity, a motion to strike out of the declaration a recital of these facts, and also an allegation that this indorsement was thus made for the purpose of guaranteeing the note, was properly overruled.[2] In an action against a corporation as indorsers, it need not be averred that the note was indorsed by the defendants in the course of their legitimate business.[3]

§ 1159. **Indorsement, Effect of.**—The presumption is that the indorser of a promissory note is the holder thereof for value.[4] Where a promissory note is indorsed in blank, the title and right of action pass by delivery, and the note is payable to the bearer.[5] An unlawful diversion is not to be presumed, but negotiation to a *bona fide* holder may be presumed, where the paper bears the blank indorsement of the defendant.[6] An agent who has received a promissory note by indorsement, holds the title as against all persons thereto, except the principal, and may maintain an action thereon in his own name.[7]

§ 1160. **Notice to Charge Indorser.**—Notice of demand, as well as of non-payment, should be alleged.[8] A general averment of notice of all the premises is sufficient.[9] Where a note is due on the first of July, the fourth being a non-judicial day, notice of protest on the third is premature, and will not charge the indorser.[10] In California, whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.[11] If much time intervenes between demand and notice, in transfers after maturity, the question may arise whether the delay has not released the indorser.[12] When demand of payment is made upon the maker of a note payable on demand, notice of demand and non-payment must be given

[1] Poorman v. Mills, 35 Cal. 118.
[2] Rey v. Simpson, 22 How. U. S. 341.
[3] Mechanics' Banking Association v. Spring Valley Shot and Lead Co., 25 Barb. 419; Nelson v. Eaton, 15 How. Pr. 305.
[4] Poorman v. Mills, 35 Cal. 118.
[5] Id.
[6] Rice v. Isham, 1 Keyes, 44.
[7] Poorman v. Mills, 35 Cal. 118.
[8] Pahquioque Bank v. Martin, 11 Abb. Pr. 291.
[9] Boot v. Franklin, 8 Johns. 207.
[10] Toothaker v. Cornwall, 3 Cal. 144.
[11] Cal. Civil Code, sec. 11.
[12] Thompson v. Williams, 14 Cal. 160.

to the indorser within the same time which is required in the case of a bill made payable at a particular day;[1] and it should be made on the day following the demand, unless good reason exists for not doing so.[2] An indorser who signs his name under the words, "holden on the within note," is entitled to notice of demand and non-payment.[3]

§ 1161. **Notice, how Given.**—Notice should be personally served, if indorser resides in the same city, and in such case service through the post-office is not sufficient.[4] To charge an indorser, it is not necessary to show that the notice of dishonor was actually received by him, nor even that it was addressed to him at his place of residence.[5] Notice left by a notary at the residence of the indorser, he being at the time absent, but not signed by any one, is insufficient to charge the indorser.[6] If the notary in good faith use due diligence, and acts upon information from proper parties in mailing his notice, the indorser will be charged, notwithstanding the notice may be sent to the wrong place and never reach him.[7] Notice of protest of a note left at the house in Washington of a member of congress, after congress had adjourned, and he had left the city as was his custom at such times, and his domicile was in the district he represented, and his Washington house was occupied by strangers by his permission, who did not pay rent, is not sufficient.[8]

§ 1162. **Notice, Sufficiency of.**—A notice is sufficient, if from it, it can be reasonably inferred that the note was presented and dishonored;[9] but if it state that the demand was made on a day subsequent to maturity, it will not bind the indorsers.[10] The certificate need not state the form of notice given, as any notice is sufficient which informs the party, either by express terms or by implication.[11] Whether verbal or written, and even without description of the note, if at the time of receiving notice he knew the paper referred to, it is sufficient.[12] Where notes are indorsed before maturity, the notice must state the time of the demand and dishonor; but it is otherwise where the note was indorsed after maturity. A notice by the holder that he had "demanded payment of that note," implies a de-

[1] Keyes v. Fenstermaker, 24 Cal. 329.
[2] Id.
[3] Vance v. Collins, 6 Cal. 435.
[4] Id.; but see Civil Code, sec. 3144.
[5] Garver v. Downie, 33 Cal. 176.
[6] Kloekenbaum v. Pierson, 16 Cal. 375
[7] Garver v. Downie, 33 Cal. 176.
[8] Bayly's Adm'r v. Chubb, 16 Gratt. (Va.) 284. As to service of notice under the Civil Code of California, see sec. 3144.
[9] Staughton v. Swan, 4 Cal. 213; Cal. Civil Code, sec. 3143.
[10] Tevis v. Wood, 5 Cal. 393.
[11] McFarland v. Pico, 8 Cal. 626.
[12] Thompson v. Williams, 14 Cal. 160.

mand of the maker; and the declaration that he intended to look to the indorser for payment, implies non-payment.[1]

§ 1163. **Notice, how Alleged.**—Where the complaint against the indorser of a note alleges due demand, non-payment, and protest, and that due notice of such non-payment and protest was given, it is sufficient, without averring notice of demand also.[2] A general averment of due notice is sufficient to charge an indorser.[3] "That the note, on the day it matured, was presented for payment at the banking house of ....., and payment thereof demanded, and thereupon the same was duly protested for non-payment," is a sufficient notice of demand, refusal, and non-payment, to charge the indorser.[4]

§ 1164. **Presentment.**—An averment that at maturity the notes were duly presented for payment to the makers, is, upon demurrer, a sufficient averment of a presentment at the place specified in the notes.[5] Nor need it be shown by whom it was presented.[6] An allegation of presentment by a bank does not imply ownership, but at most a holding as agent for another,[7] where it was alleged in a declaration that a note when due was presented to the bank for payment, to wit, twenty-third of July, 1841, it was held, that the statement of the date, being inconsistent with the allegation that the note was presented when due, should be rejected as surplusage.[8]

§ 1165. **Presentment and Demand.**—To charge an indorser of a note payable on demand, presentment must be made within a reasonable time, and what constitutes a reasonable time depends upon the facts of each particular case.[9] If delay has occurred, the holder must aver and prove the circumstances excusing the delay.[10] A delay of thirteen months was held unreasonable.[11] After presentment and demand, the liabilities of the parties become fixed.[12] But the presentment and demand must be made in reasonable hours, and reasonable hours depend upon the question whether or not the bill is payable at a bank or elsewhere.[13] And when a promissory note is protested, the protest must be attended with all the incidents

[1] Thompson v. Williams, 14 Cal. 160.
[2] Spencer v. Rogers Locomotive Works, 17 Abb. Pr. 110.
[3] Firth v. Thrush, 8 Barn. & Cress. 387; S. C., 2 Man. & R. 359; Dwight v. Wing, 2 McLean, 580.
[4] Eastman v. Turman, 24 Cal. 379.
[5] Ferner v. Williams, 37 Barb. 9; 14 Abb. Pr. 215.
[6] Boehm v. Campbell, Gow. 55; S. C., 5 Eng. Com. L. R. 459; and see Hunt v. Maybee, 7 N. Y. 266.
[7] Farmers' and Mechanics' Bank v. Wadsworth, 24 N. Y. 547.
[8] Hyslop v. Jones, 3 McLean, 96.
[9] Keyes v. Fenstermaker, 24 Cal. 329.
[10] Id.
[11] Jerome v. Stebbins, 14 Cal. 474.
[12] McFarland v. Pico, 8 Cal. 626.
[13] Id.

of a foreign bill of exchange.[1] Presentment of a note to a joint maker is excused, if at the time of the execution and maturity of the note, such maker resided in a state other than that in which payment should be made.[2]

§ 1166. **Allegation of Notice to Indorser Waived.**

Form No. 311.

That the defendant [indorser] thereafter waived the laches of the plaintiff in not giving him notice thereof, and promised to pay said note.

§ 1167. **Allegation of Excuse for Non-presentment—Maker not Found.**

Form No. 312.

That at the maturity of said note, search and inquiry was made for said John Doe, at [place of date of note], that the same might be presented to him for payment; but he could not be found, and the same was not paid. [NOTE.—State any facts relative to search and inquiry, and failure to find the party.][3]

§ 1168. **Allegation of Promise to Pay.**—There is a distinction between a promise by the indorser to pay, proved as presumptive evidence of actual notice, and a promise proved as evidence of a waiver. The former should not be alleged; the latter should.[4]

§ 1169. **Protest.**—There is no necessity of protesting a promissory note. A demand of payment and refusal, and notice to the indorser are all that is required.[5] It is but a form of evidence of demand and notice. A simple averment of presentment and refusal to pay is sufficient.[6] An averment of protest does not imply a proper demand.[7] An averment that a note protested is not equivalent to an averment that it was duly presented for payment to the maker, and payment was refused.[8]

§ 1170. **The Same—Against Maker and First Indorser.**

Form No. 313.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the .... day of ....., 18.., at ...., the

[1] Tevis v. Randall, 6 Cal. 632.

[2] Luning v. Wise, 1 West Coast Rep 138.

[3] Of course the allegation depends upon the facts in each case. As to sufficiency of this form, see 2 Ch. Pl. 134.

[4] Thornton v. Wynn, 12 Wheat. 183. Leonard v. Gary, 10 Wend. 504; Tobetts v. Dowd, 23 Wend. 379; Miller v. Hackley, 5 Johns. 375; Durvee v. Dennison, Id. 248; Jones v. O'Brien, 26 Eng. L. & Eq 283.

[5] 1 Pars. on Cont. 238; Edw. on Bills, 268; Coddington v. Davis, 1 N. Y. 186; McFarland v. Pico, 8 Cal. 626; Cole v. Jessup, 10 How. Pr. 515.

[6] Price v. McClave, 6 Duer, 514.

[7] Graham v. Machado, 6 Duer, 515; Price v. McClave, Id. 514.

[8] Price v. McClave, 3 Abb. Pr. 253.

defendant, A. B., by his promissory note, promised to pay to the defendant, C. D., ... dollars, ... months after date.

II. That the said C. D. indorsed the same to the plaintiff.

III. That on the ..... day of ....., 18...., the same was presented to the said A. B. for payment, but was not paid.

IV. That due notice thereof was given to the said C. D.

V. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1171. **Discharge of Indebtedness.**—Giving a note payable at a future time does not discharge the debt.[1] So when a note is given for an account.[2] The substitution of a new security will discharge the indorser.[3] Where a person sued on a note which had two indorsements, signed by the payee, the first a receipt for the amount due, and the second in the words, "without recourse to me," there was no presumption that the indorsements were made at different times, or that payment was voluntary and unconditional.[4]

§ 1172. **Indorsement.**—The allegation of indorsement to the plaintiff is essential.[5]

§ 1173. **Joint and Several Liability.**—In New York the assignor and maker of non-negotiable paper can not be joined in an action thereon by the assignee.[6]

§ 1174. **Indorsee Against Maker, on Note Drawn to Maker's Own Order.**

Form No. 514.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18...., at....., the defendant, by his promissory note, promised to pay to bearer [or to his own order], ... dollars, ... months after date [or on demand].

II. That the same was by the indorsement of the defendant transferred to the plaintiff.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1175. **Indorsement Essential.**—It would seem that when a note is drawn to the drawer's own order, the indorsement by the maker is necessary to pass the title.[7] But in New York it is provided otherwise by statute.[8]

[1] Brewster v. Bours, 8 Cal. 502; Smith v. Owens, 21 Id. 11.

[2] Higgins v. Wortell, 18 Cal. 330.

[3] Smith v. Harper, 5 Cal. 329.

[4] Frank v. Brady, 8 Cal. 47.

[5] Montague v. Reinger, 11 Iowa, 503; Bennett v. Crowell, 7 Minn. 385.

[6] White v. Low, 7 Barb. 204; and see Allen v. Fosgate, 11 How. Pr. 218.

[7] Macferson v. Thoytes, Peake's N. P. C. 29; Bosanquet v. Anderson, 6 Esp. 43; Smith v. Lusher, 5 Cow. 688.

[8] 2 R. S. N. Y. 53; and see Plets v. Johnson, 3 Hill, 112; Masters v. Bar-

§ 1176. **Subsequent Indorsee against Maker.**

Form No. 315.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege making of note.]

II. That the same was, by the indorsement of the said C. D. and L. M. and N. O. [or, and others], transferred to the plaintiff.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1177. **Allegation of Indorsements.**—The use of the words "and others" will perhaps obviate the necessity of proving the indorsements, which if stated, must be proved. It is not necessary to state all the indorsements, as possession by plaintiff and production at the trial is a legal presumption that he is the owner, and for value.[1] Nor to allege genuineness of indorsements.[2] If the defendant on the trial prove loss or theft of the note in rebuttal of such presumption, the plaintiff may prove that he took the note in good faith, and for a valuable consideration.[3]

§ 1178. **The Same—Against First Indorser—Indorsement Special.**

Form No. 316.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to one A. B. a promissory note made by one C. D., on the ..... day of ....., 18..., at ....., to the order of the defendant, for the sum of ..... dollars, payable ..... days after date.

II. That the same was by the indorsement of the said A. B. transferred to the plaintiff [or that the said E. F. indorsed the same to the plaintiff].

[DEMAND OF JUDGMENT.]

§ 1179. **The Same—Against Intermediate Indorser.**

Form No. 317.

[TITLE.]

The plaintiff complains, and alleges:

I. That a promissory note made by one A. B. on the ..... day of ....., 18..., at ....., to the order of one C. D., for

rets, 2 Carr. & K. 715; S. C., 61 Eng. Com. L. 714.

[1] Smith v. Schanck, 18 Barb. 344; James v. Chalmers, 2 Seld. 209.

[2] Pentz v. Winterbottom, 5 Den. 51.

[3] Catlin v. Hauser, 1 Duer, 399; Rochester v. Taylor, 23 Barb. 18; Peacock v. Rhodes, 2 Dougl. 633; 4 Sandf. 97; Millis v. Barber, 1 Mee. & W. 425; De la Chaumette v. Bank of England, 9 Barn. & Cress. 208; 2 Campb. 5; Miller v. Race, 1 Burr. 452; Grant v. Vaughan, 3 Id. 1516.

the sum of ..... dollars [payable ..... days after date], and indorsed by the said C. D. to the defendant, was by the indorsement of the defendant transferred to the plaintiff.

II., III., and IV. [Same as in form No. 313.]

[DEMAND OF JUDGMENT.]

§ 1180 The Same—Against his Immediate Indorser.

Form No. 318.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to him a promissory note made by one A. B. on the .... day of ....., 18...., at ....., to the order of one C. D., for the sum of ..... dollars, payable..... days after date, and indorsed by the said C. D. to the defendant.

II., III., and IV. [As in form No. 313.]

[DEMAND OF JUDGMENT.]

§ 1181 The Same—Against All Prior Parties.

Form No. 319.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the .... day of ....., 18.., at....., the defendant A. B., by his promissory note, promised to pay to the order of the defendant C. D..... dollars,..... months after date.

II. That the said C. D. indorsed the same to the defendant E. F., who indorsed it the plaintiff.

III. That on the.....day of ....., 18.., the same was presented [or state facts excusing presentment] to the said A. B. for payment, but it was not paid.

IV. That notice thereof was given to the said C. D. and E. F.

V. That the same has not been paid, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1182. Transfers not by Indorsement—By Assignee of Note.

Form No. 320.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of ....., 18...., at....., the defendant, by his promissory note, promised to pay to the order of one A. B., ... dollars,.....days after date.

II. That said A. B. sold and delivered said note to the plaintiff [for a valuable consideration, before it was payable].

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1183. **Allegations of Assignment.**—An averment that the note was assigned on the day or at the time of its execution is sufficient.[1] But consideration need not be averred.[2] By the assignment of the note alleged, the plaintiff acquired title to the note, and the action, under the code could be maintained in his own name.[3] Under the common law, if it appeared from the declaration that the note was not yet payable, a demurer would lie.[4] If the complaint, not verified, sets out the note, and avers assignment by payee to plaintiff, and the answer is a general denial, the plaintiff must prove the assignment.[5] In an action against the maker of negotiable paper payable to bearer, it is sufficient, after alleging that the defendants drew it, to allege that it was transferred and delivered to the plaintiff without saying by whom, if it be also alleged that the transfer was for value, and that the plaintiff was the owner.[6] The allegation on a note payable to bearer is sufficient, if it allege that it is his property, and that the amount is due.[7] In case the note is payable to the order of a fictitious person, and in case it is payable to the maker's own order, it is in law payable to bearer.[8] The words "before its maturity," and "for value," are not material to the cause of action. Unless the contrary is shown, the indorsement will be presumed to have been made before maturity.[9] In an action upon promissory notes assigned to the plaintiff, and for goods sold, the plaintiff may properly allege in his complaint, on his "information and belief," that the notes were executed by the defendant; and he might allege in the same way that the goods were sold to the defendant, for they might have been sold by his agent. A motion to strike out the words "on information and belief" should be denied.[10]

§ 1184. **Law of Place.**—An assignment of a negotiable instrument, as between the parties to that assignment, is subject to the law of the place where the assignment is made; and if by such law the assignment is void, as against law the as-

[1] Silver v. Henderson, 3 McLean, 165; compare Earhart v. Campbell, Hempst. 49.

[2] Wilson v. Codman's Ex'rs, 3 Cranch, 193.

[3] Savage v. Bevier, 12 How. Pr. 166; Hastings v. McKinley, 1 E. D. Smith, 273.

[4] Waring v. Yates, 10 Johns. 119; Lowry v. Lawrence, 1 Cai. 69.

[5] Hastings v. Dollarhide, 18 Cal. 391.

[6] Mechanics' Bank v. Straiton, 5 Abb. Pr. (N. S.) 11.

[7] Dabney v. Reed, 12 Iowa, 315.

[8] Minet v. Gibson, 1 H. Blackst. 569; Plets v. Johnson, 3 Hill, 112.

[9] Pinkerton v. Bailey, 8 Wend. 600; Pratt v. Adams, 7 Paige Ch. 615; Nelson v. Cowing, 6 Hill, 336; Case v. Mechanics' Banking Association, 4 N. Y. 166; and see James v. Chalmers' 6 Id. 209.

[10] St. John v. Beers, 24 How. Pr. 377.

signee can exercise no right under such assignment;[1] and what is a discharge of a contract, in a place where it was made, will be of equal avail in every other place. Except that where a contract is to be executed at a place different from that where it is made, the law of the place of execution will apply.[2]

§ 1185. **Note with a Blank for Name of Payee, how Pleaded.**—Where, in an instrument for the payment of money, the name of the payee is left blank, with the intention that such instrument may be transferred by delivery, since any lawful holder may fill the blank with his own name as payee, he may plead it in an action thereon as having been delivered to some persons unknown, for a consideration from them received, and as having thereafter come lawfully into plaintiff's possession, and that he is the owner thereof.[3] There must be two parties to every promissory note, a maker and a payee; if the payee named is not *in esse* there is no note.[4]

§ 1186. **Partnership and Individual Liability.**—A complaint would seem to be bad which shows a partnership note as a cause of action against an individual. If there was no real firm, it should have been alleged that the note was signed by A. B., in the name of A. B. & Co. The words "& Co." indicate a firm. The defendant may have been a member of that firm, and yet never have made the note, nor have had any such knowledge of its existence. It may have been the objection is not strictly for defect of parties, but that the complaint does not, on its face, show an individual liability on the part of "A. B."[5]

§ 1187. **Allegation of Plaintiff's Title.**—In an allegation on a note payable to a third person, the right of plaintiff should be alleged.[6] And if the answer does not deny the allegation, defendant can not prove that payee had no capacity to transfer.[7] Thus, in an action against one A. B., as the maker, and others as indorsers of a promissory note, the complaint set forth a copy of the note signed A. B. & Co., upon which it alleged the defendants were indebted, etc. The word "signed" was prefixed to the name of the makers, and the word "indorsed" was prefixed to the name of the indorsers in the copy; but there

[1] 5 East, 123; 12 Johns. 142; Powers v. Lynch, 3 Mass. 77; McClintick v. Cummins, 3 McLean, 158; Dundas v. Bowler, Id. 397.

[2] Van Reimsdyk v. Kane, 1 Gall. 371.

[3] Hubbard v. N. Y. & Harlem R. R. Co., 14 Abb. Pr. 275.

[4] Wayman v. Torreyson, 4 Nev. 124.

[5] Price v. McClave, 6 Duer, 544, affirming S. C., 5 Id. 670.

[6] Montague v. Reineger, 11 Iowa, 503; Bennett v. Crowell, 7 Minn. 385

[7] Robbins v. Richardson, 2 Bosw. 248.

was no other allegation that the defendants made or indorsed the note, except that it was alleged that the note was "written," and that it was passed to the plaintiff; it was held on demurrer, that the making and indorsement should be deemed sufficiently alleged.[1] An allegation that a corporation indorsed and transferred and delivered to the plaintiffs the note sued on, sufficiently implies that the transfer was made pursuant to a resolution of the board of directors, if such resolution is necessary. So an allegation that after the transfer the company became insolvent and was dissolved, is an indirect statement that it was solvent when the transfer was made.[2] Yet all necessary allegations should be directly made.

§ 1188 By the Treasurer of an Unincorporated Company, on a Note Payable to the Former Treasurer.

Form No. 321.

[TITLE.]

The plaintiff complains, and alleges:

I. That the Mountain View Homestead Association is an association consisting of ..... persons, in the city of ....., in this state.

II. That at the time hereinafter mentioned, one A. B. was treasurer thereof.

III. That on the ..... day of ....., 18..., the defendant made his promissory note, of which the following is a copy [copy of note], and thereupon delivered the same to said A. B., as the treasurer of the association, who was duly authorized to receive it on their behalf.

IV. That said note was given for the benefit of the association, and that it is the property of the members thereof, and owned by them in common.

V. That this plaintiff is now the treasurer of said association, and, as such, is the lawful holder of said note on and for their behalf.

VI. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.][3]

§ 1189. On a Note Payable on a Contingency.

Form No. 322.

[TITLE.]

The plaintiff complains, and alleges:

[1] Phelps v. Ferguson, 9 Abb. Pr. 206; Lee v. Ainslie, 4 Id. 463; Bank of Geneva v. Gulick, 8 How. Pr. 51.

[2] Nelson v. Eaton, 15 How. Pr. 305; Taylor v. Corbiere, 8 Id. 385; but see Montague v. King, 37 Miss. 441.

[3] Homestead associations, under the statutes of California, are incorporated pursuant to the statute. Hence the above form is not strictly applicable in this state.

I. That on the ..... day of ....., 18..., at ....., the defendant made and delivered to the plaintiff his promissory note, in writing, of which the following is a copy:

$300. SHASTA, January 1, 1869.

For value received, I promise to pay to A. B., one year after date, three hundred dollars, in case the proceeds of the newspaper route I have this day bought of him shall exceed the sum of one thousand dollars. C. D.

II. That the proceeds of said newspaper route did, before the expiration of said year, exceed the sum of one thousand dollars.

III. That no part of the said note has been paid.

[DEMAND OF JUDGMENT.]

§ 1190. **Condition Precedent.**—Where a note was made payable on the contingency of the confirmation of a grant of land, the confirmation was a condition precedent to the payment of the note.[1] Where the complaint on a promissory note shows that, by agreement of the parties, its payment was made conditional upon the payment by the payee, of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made.[2]

§ 1191. **On Note Payable in Chattels.**

Form No 323.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18...., at ....., the defendant, for value received [or, where the consideration is expressed in the note, for a valuable consideration therein expressed], made and delivered to plaintiff his promissory note, of which the following is a copy:

For value received, thirty days after date, I promise to pay A. B. five hundred dollars, in clothing, at the usual market rates; the same to be delivered within two days after the same is selected or demanded by the said A. B.; and on default thereof, I agree to pay the said amount in money. C. D.

January 1, 1869.

II. That the plaintiff thereafter demanded of defendant the said clothing, but defendant refused to deliver it, or any part thereof to him [or that the plaintiff thereafter performed all the conditions of the same on his part].

III. That no part thereof has been paid.

[DEMAND OF JUDGMENT.]

[1] Sanders v. Whitesides, 10 Cal. 88. [2] Rogers v. Cody, 8 Cal. 324.

§ 1192. **Consideration.** — Consideration in such complaints may be specially set out,[1] and if so stated, must be proved as laid.[2] It must be averred, when the instrument itself does not import a consideration.[3] In case the consideration be subject to transfer on demand of payment, the plaintiff must allege a transfer or tender of transfer.[4]

§ 1193. **Demand.**—The demand should be made at the place of business of the maker of the note, when the note is payable in chattels.[5] But if the day of delivery of chattels be defined in the note, as "on or before" a day named, no demand is necessary, unless the holder exercises an election as to choice of goods.[6] Where the payee of a note of forty dollars, payable on demand, in "hemlock bark, at the going price," in the summer of 1863, requested the maker to have the bark peeled in the course of the summer (the peeling season), and delivered the next winter, which the maker agreed to do, but the bark was not delivered: it was held that the demand was appropriate to the note, and that on defendant's failure to furnish the bark, the payee could recover on the money counts.[7]

§ 1194. **Effect of Indorsement.**—The indorser of such a note has no right to insist on a previous demand on the maker, but is immediately liable thereon.[8]

§ 1195. **Maturity.**—It seems such notes are generally due on demand, and a special demand is necessary.[9]

§ 1196. **Measure of Damages.**—Upon such notes, the measure of damages is the sum of money named.[10]

§ 1197. **Non-payment.**—The allegation of non-payment of the money is alone sufficient.[11]

§ 1198. **On Guaranties—Against Maker and Guarantor of a Promissory Note.**

Form No. 524.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the defendant A. B., and C. D. as his security, by their promissory

[1] Ward v. Sackrider, 3 Cai. 263.
[2] Jerome v. Whitney, 7 Johns. 321.
[3] Spear v. Downing, 34 Barb. 522.
[4] Considerant v. Brisbane, 14 How. Pr. 487.
[5] Vance v. Bloomer, 20 Wend. 196; Rice v. Churchill, 2 Den. 145
[6] Johnson v. Seymour, 19 Ind. 24.
[7] Reed v. Sturtevant, 40 Vt. 521.
[8] Seymour v. Van Slyck, 8 Wend. 403; affirmed, *sub nom.* Stone v. Seymour, 15 Id. 19.
[9] Lobdell v. Hopkins, 5 Cow. 516; but see Barns v. Graham, 4 Id. 452;
[10] Pinney v. Gleason, 5 Wend. 393; Rockwell v. Rockwell, 4 Hill, 164; and see Gilbert v. Danforth, 6 N. Y. (2 Seld.) 585.
[11] Rockwell v. Rockwell, 4 Hill, 164.

note promised to pay to the order of one E. F.....dollars [..... days after date].

II. That the said E. F. indorsed the same to the plaintiff.

III. That on the ....day of....., 18...., the same was presented [or state facts excusing presentment] to the said A. B. for payment, but was not paid.

IV. That notice thereof was given to the said C. D.

V. That the defendants have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1199. **Certificate of Deposit.**—Where the indorsee, on payment to him of the amount, guarantees the genuineness of the signature, which is afterwards found to be a forgery, and the payee recovers from the makers the amount of certificate and costs, the maker may recover from the indorsee and guarantor the costs of the former action.[1]

§ 1200. **Demand and Notice.**—Where it is agreed "that if the holder should not be able to collect the note from the maker by due course of law, then the guarantor would be responsible without requiring notice," it is a waiver of demand on the maker.[2] A note indorsed, "I guarantee the collection of the within note when due," contemporaneous with the signing of the note, constitutes a guaranty, and the party is entitled to the legal notice of non payment before he can be charged on his contract.[3] A complaint is sufficient which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice.[4] "I assign the within to K., for value received, and bind myself to pay it promptly after maturity," indorsed upon a note, is a guaranty, and demand and notice are not necessary to fix the guarantor's liability on failure of the makers to pay at maturity.[5] So in case of a lease.[6]

§ 1201. **Discharge of Surety.**—Mere extension of time to the maker is not sufficient to discharge a surety or indorser, unless it will be such as will suspend the right of action against the maker.[7] The failure of a holder of a note to sue, when requested by the surety, does not in general operate to discharge the liability of the latter.[8] If the surety desires to protect himself, he must pay the note, and proceed against the principal.[9]

[1] Mills v. Barney, 22 Cal. 240.
[2] Backus v. Shipherd, 11 Wend. 629.
[3] Reeves v. Howe, 16 Cal. 152.
[4] Lightstone v. Laurencel, 4 Cal. 277.
[5] Baker v. Kelly, 41 Miss. 696.
[6] Voltz v. Harris, 40 Ill. 155.
[7] Williams v. Covillaud, 10 Cal. 419; Draper v. Romeyn, 18 Barb. 166.
[8] Hartman v. Burlingame, 9 Cal. 557.
[9] Id.

§ 1202. **Guarantor, Who is.**—One who puts his name upon a promissory note, out of the usual course of regular negotiability, is a guarantor, whether inscription is in blank or accompanied by the words, "I guarantee," etc.[1] Or if the indorser accompanies his signature with the words, "I hereby waive demand, notice of non-payment, and protest," he is a guarantor.[2] Where the holder of a note, after its maturity, obtained from a stranger a guaranty of its payment within sixty days from date of guaranty, there is no presumption of law that the guarantee was taken for the benefit of the maker, or that it extended to him the time of payment.[3]

§ 1213. **Joint Liability.**—Each one who writes his name upon a promissory note is a party to it, and each party an original undertaker,[4] as the note itself imports consideration. Where a party signs a joint and several note, he is not entitled to notice of non-payment, though in fact he signed as surety.[5] When a promissory note is signed by two persons in the same manner, with nothing to show that one was surety, one of such signers can not set up that he was a surety only.[6] Where, in the body of the note, one party signs as principal, and one as surety, both are liable.[7]

§ 1204. **Liability of Guarantor.**—The liability of an indorser is a guaranty that he will pay, if the maker does not, upon presentment, if he receives notice. And the liability of a guarantor is the same, and he is entitled to all his rights *stricti juris*.[8] Where the defendant signed a negotiable note, as surety, and delivered it to his principal, on the condition that it should not be delivered to the payee, or negotiated, until another party should have signed the same as co-surety, and it was delivered without such other signature, but the payee did not know of such condition, and there was nothing on the face of the note to put him on inquiry, it was held that defendant was liable.[9]

§ 1205. **Nature of Contract.**—A guarantee is an independent contract, which does not suspend any right of action of

[1] 1 Riggs v. Waldo, 2 Cal. 485; Chit. on Cont. 397; 3 Kent's Com. 121.

[2] Ford v. Hendricks, 34 Cal. 673; see, also, Brady v. Reynolds, 18 Id. 31; Story on Prom. Notes, sec. 434; Fell's Law of Guar. & Sur. 1; Hall v. Farmer, 5 Den. 484; Miller v. Gaston, 2 Hill, 191; Meech v. Churchill, 2 Wend. 630.

[3] Williams v. Covillaud, 10 Cal. 419.

[4] Riggs v. Waldo, 2 Cal. 485.

[5] Hartman v. Burlingame, 9 Cal. 557; Dane v. Cordman, 24 Id. 157.

[6] Kritzer v. Mills, 9 Cal. 21.

[7] Humphreys v. Crane, 5 Cal. 173.

[8] Riggs v. Waldo, 2 Cal. 485; Ford v. Hendricks, 34 Id. 673; Pierce v. Kennedy, 5 Id. 148.

[9] Merriam v. Rockwood, 47 N. H. 81; see Hoboken City Bank v. Phelps, 34 Conn. 92.

the holder of the note against its maker.[1] An indorsement or a guaranty of a note, as an agreement of itself, a new contract undertaken for another.[2] The contract of indorsement is primarily that of transfer; the contract of guaranty is that of security.[3]

§ 1206. **Notice of Protest.**—In California, prior to the adoption of a civil code, a notice of protest was as essential to charge a guarantor as an indorser,[4] as the liability of a guarantor was the same as that of the indorser, and he was entitled to all his rights *stricti juris*.[5] Subsequent to the adoption of the civil code, a guarantor is not entitled to demand of notice.[6] "I hereby waive demand, notice of non-payment and protest, Q. R.," indorsed on the note of a third party before it is delivered by the maker, is a guaranty, and not within the statute of frauds.[7]

§ 1207. **Primary Liability.**—One who signs a note to pay absolutely at a certain time is making his own contract, although he puts "surety" with his name.[8] When in consideration of a conveyance, a party agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, he is primarily liable for the note.[9]

§ 1208. **Surety — Security.**—The word "surety" does not in any way control the words of the note, as between the payor and payee.[10] Where three parties purchased property together, one taking an undivided half, and each of the others taking an undivided fourth, and for the purchase money executed their joint note, the purchaser of the half interest was a principal and co-surety with the others for their interests.[11] Where a promissory note was made jointly by A. and B. and delivered to C., the consideration being delivered to A. alone, and as between A. and B., the latter signed as surety for A., who had deposited collateral security with C., of which transaction as a whole C. had notice when the note was executed, as between the makers and the payee, A. and B. were principals, and liable as such to C.[12]

§ 1209. **Trustee.**—Where a party signs a promissory note, with the addition to his name of the word "trustee," he is per-

[1] Williams v. Covillaud, 10 Cal. 419.
[2] Aud v. Magruder, 10 Cal. 282.
[3] Brady v. Reynolds, 13 Cal. 31.
[4] Riggs v. Waldo, 2 Cal. 485.
[5] Geiger v. Clark, 13 Cal. 580; Crooks v. Tully, 50 Id. 254.
[6] Civil Code, sec. 2807.
[7] Ford v. Hendricks, 34 Cal. 673.
[8] Aud v. Magruder, 10 Cal. 282.
[9] Palmer v. Tripp's Adm'r, 8 Cal. 95.
[10] Aud v. Magruder, 10 Cal. 282.
[11] Chipman v. Morrill, 20 Cal. 130.
[12] Damon v. Pardow, 34 Cal. 278.

sonally liable.[1] A note stating that "we the undersigned, trustees of, etc., on behalf of the whole board of trustees of said association, promise to pay," etc., and signed without qualification by two persons having authority, is a note of the association.[2]

§ 1210. **What Contract Imports.**—The difference between a maker and indorser or guarantee, is that the contract of the first imports an unconditional obligation, that of the last a conditional obligation.[3]

§ 1211. **When Action Lies.**—Where a guaranty is given in consideration of an extension of time to the maker, the holder of the note must exhaust his remedy on the original demand, and can then compel the guarantor to make good the deficiency.[4] A creditor having legally fixed the liability of the guarantor, is not bound to sue the d btor in order to hold the guarantor. The guarantor should pay the debt, and then sue the principal, or file a bill to compel the creditor to sue.[5]

[1] Conner v. Clark, 12 Cal. 168.
[2] Haskell v. Cornish, 13 Cal. 45.
[3] Aud v. Magruder, 10 Cal. 282.
[4] Donahue v. Gift, 7 Cal. 242; but see, also, Gross v. Parrott, 16 Id. 148.
[5] Whiting v. Clark, 17 Cal. 407.

SUBDIVISION FOURTH.

FOR DAMAGES ON BREACH OF CONTRACT.

CHAPTER I.

BUILDER'S CONTRACTS.

§ 1212. By Contractor, on Special Contract, Modified, with a Claim for Extra Work.

Form No. 325.

[TITLE.]

The plaintiff complains, and alleges:

First.—For a first cause of action:

I. That on the ..... day of ...., 18..., at ...., the defendant under his hand and seal made a contract in writing with the plaintiff, of which the following is a copy [copy contract].

II. That he has duly performed all the conditions thereof on his part, except that, at the request of the defendant, he finished the building with hard finish instead of cloth and paper, for which the defendant promised to pay a reasonable sum in addition to the price named in the contract. That by the consent of the defendant the time for completing said work was extended for one month beyond the time fixed for the contract, to wit, to the ..... day of ....., 18...

III. That the plaintiff on his part duly performed all the conditions of said contract as modified.

IV. That the sum of ..... dollars is a reasonable payment to be made in addition to the price named in said contract for finishing the building with hard finish instead of cloth and paper.

V. That on the ..... day of ....., 18..., at ....., the plaintiff demanded of the defendant payment of the sum of ..... dollars, the amount due on said contract as modified.

VI. That he has not paid the same nor any part thereof.

Second.—For a second cause of action:

I. That between the ..... day of ..... 18..., and the .....day of ...., 18.., at ....., the plaintiff rendered

further services and furnished materials to the defendant, at his request, in [here state extra work and material], for which the defendant promised to pay.

II. That the same are reasonably worth ..... dollars.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1213. **Essential Averments.**—Under the rules of pleading established by the code, the party to a written contract for the erection of the building, who has performed his part of it by the erection of the same, can not bring an action against the other party who has failed to fulfill, for work and labor done and performed; but the complaint must aver the execution of the contract, its terms, the performance of the same on the part of the plaintiff, and the non-performance by the other party, and the damages thereby sustained.[1] The contract should be set forth in the complaint, together with the necessary allegations of deviations, performance, etc., which the plaintiff must prove, instead of the general allegation that the defendant is indebted for work and labor, etc.[2] The plaintiff may plead as follows: 1. He may set forth the contract according to its legal effect, as modified, and then allege that he has duly "performed all the considerations thereof on his part;" or, 2. He may set forth the contract *in hæc verba*, and then state that he has duly performed, etc., all the conditions thereof on his part, except that in certain points it was subsequently modified, and that in those points he fulfilled it according to the modifications.[3]

§ 1214. **Abandonment of Contract.** If the contract for the erection and completion of a building is entire, and the contractor abandons the work before it is completed, he loses the right which he would have had to the full compensation agreed on.[4]

§ 1215. **Acceptance by Architect.**—Where a contract for alterations and repairs to a building was to be performed in a certain manner, particularly specified, "subject to acceptance or rejection by E. W., architect," and payment only to be made when the work was completely done and accepted, it was held that the provision for acceptance was only an additional safeguard against defects not discernible by an unskilled person, and the architect could not, by accepting a different class of work from that provided for, or inferior materials, bind the

[1] O'Connor v. Dingley, 26 Cal. 11.
[2] Id.
[3] Smith v. Brown, 17 Barb. 481; see, also, Hatch v. Peet, 23 Id. 575.
[4] Blythe v. Poultney, 31 Cal. 233.

owner of the building to pay for them.[1] The architect's approval or disapproval must be based upon the requirements of the contract.[2]

§ 1216. **Acceptance of Work.**—Where the work has been accepted and approved by the superintendent, under a contract for repairs of streets, it is a full performance of the contract; and if the parties are dissatisfied they should have appealed to the board of supervisors. This was their only remedy.[3] That the defendants demanded possession, which the plaintiff delivered up to them, is not a sufficient averment of acceptance on the part of the plaintiff.[4] Where the work was to be done to the satisfaction of the defendant, it is not necessary to aver that it was done to his satisfaction, if it is shown to be according to the contract; but if the contract requires it to be done to the satisfaction of third persons, the plaintiff must aver that it was done to their satisfaction.[5]

§ 1217. **Payment—Terms of.**—When, by the terms of the contract, payment was to be made upon a certificate of the architect, "that the work was fully and completely finished according to the specification," the giving of a certificate to that effect must be averred and proved.[6] But where payment was to be made upon a certificate of an officer, the complaint should allege that he had made such certificate. It need not be averred also that the work had been performed.[7] And on a written contract to build certain bridges for a railroad company, to be paid for, one-fourth in cash, and the rest in stock, no time and place of payment stated, the payment could not be required until the terms of the contract were complied with, or at least that payment on any bridge was not due until such bridge was completed. And where no time or place is fixed by the agreement, express or implied, a demand is essential to base an action upon.[8] But after performance in such a contract, an action will lie without proof of the demand of the stock.[9]

§ 1218. **Enlargement of Time.**—The time of performing a simple written contract may be enlarged by parol.[10] But not

[1] Glacius v. Black, 50 N. Y. 145.

[2] Doyle v. Halpin, 33 N. Y. Sup. (1 J. & Sp.) 352. For cases depending on special facts, see Killip v. Metzen, 50 N. Y. 658; Shute v. Hamilton, 3 Daly, 462; see, also, Blethen v. Blake, 44 Cal. 117.

[3] Emery v. Bradford, 29 Cal. 75; Taylor v. Palmer, 31 Cal. 248; Beaudry v. Valdez, 32 Cal. 278.

[4] Smith v. Brown, 17 Barb. 431.

[5] Butler v. Tucker, 24 Wend. 447.

[6] Smith v. Briggs, 3 Den. 73; Wyckoff v. Meyers, 44 N. Y. 143.

[7] Towsley v. Olds, 6 Clark (Iowa), 526.

[8] Boody v. Rutland & Burlington R. R. Co., 3 Blatchf. 25.

[9] Hallihan v. Corporation of Washington, 4 Cranch C. Ct. 304.

[10] 12 Barb. 366; Meehan v. Williams, 36 How. Pr. 73.

unless the parol contract be upon sufficient consideration.[1] And the extension is not an alteration necessarily material to the cause of action.[2] But after a contract is modified, the declaration must not be upon the original contract alone.[3]

§ 1219. **Performance—Averment of.**—Building contracts need not be literally complied with in every punctilio, as a condition to recovery.[4] Thus where there was a special contract to build a house by a certain day, which was not fulfilled, owing to various circumstances, and the contractor brought a suit setting forth the special contract and averring performance, it was erroneous in the court to instruct the jury to find for the plaintiff, as the work was not finished by the appointed day, though it was completed after the appointed time with the knowledge and approbation of the defendant.[5] But in a contract for the erection of a building upon the land of another, if performance is to precede payment, and is the condition thereof, the builder, having substantially failed to perform according to the specification of the contract on his part, can recover nothing for his labor and materials, notwithstanding the owner has chosen to occupy and enjoy the erection.[6] The pleader may aver performance which he wishes to aver, and state excuses and causes for non-performance of other conditions.[7] If there has been any variation from the terms of the written contract in the progress of the work, by consent of the parties, that fact should also be averred, and the performance of the contract as varied.[8]

§ 1220. **Extra Work.**—It is held that the contractor can not recover for extra work, merely upon the proof that such work was done at defendant's request, the presumption being that provision was made for extra work under the contract.[9] The employer is bound to pay the contractor for extra work and materials, in a deviation from the contract, upon an oral order.[10]

§ 1221. **Public Works.**—Contracts for the construction of public works are not necessarily illegal because for an amount

[1] Tinker v. Geraghty, 1 E. D. Smith, 687.

[2] Crane v. Maynard, 12 Wend. 408.

[3] Freeman v. Adams, 9 Johns. 115.

[4] Smith v. Gugerty, 4 Barb. 614.

[5] Dermott v. Jones, 23 How. U. S. 220.

[6] Ellis v. Hanlen, 3 Taunt. 52; Pike v. Butler, 4 Comst. 360; Smith v. Brady, 17 N. Y. 173. Compare, to the contrary, Hayward v. Leonard, 7 Pick. 181; Smit v. Congregational Meeting House, 8 Id. 178; Britton v. Turner, 6 N. H. 487; which were disapproved in the cases first cited.

[7] For the rules on the subject of averment of performance of conditions precedent see *ante*, "Complaints in General;" also, 1 Chit. Pl. 283; Hatch v. Peet, 23 Barb. 575.

[8] O'Connor v. Dingley, 26 Cal. 11.

[9] Collyer v. Collins, 17 Abb. Pr. 469.

[10] Smith v. Gugerty, 4 Barb. 614. For a case where the contract provided for the contingency of extra work, see Alger v. Vanderpool, 34 N. Y. 161.

exceeding the sums appropriated by law.[1] So a contract for the performance of certain public work, not authorized by law, provided the legislature shall sanction it, is not void as against public policy.[2] When a contract for the construction of a public work is silent as to time and manner of measurement, the law implies that the work is to be done of the ordinary kind, and the measurement made in the ordinary way.

§ 1222. **Separate Counts.**—Where the complaint contained three counts, the first on a special contract for the erection of a warehouse, the second for extra work on the building, and the third for work and labor done, and materials furnished in its erection, and the answer denied the allegations of the first two counts, but failed to deny the allegations of the third, it was held that the third count should be considered as denied.[3]

§ 1223. **Performance by Substitute.**—An agreement to find work and materials for building a house entitles the party to recover upon the completion of the work, although he procured it to be done by other parties.[4] If a new contract was substituted, the original should not be pleaded.[5]

§ 1224. **Terms of Contract.**—Upon a compliance on the part of a subcontractor, laborer, or material man, with the terms of the statute, their right, which through the original contractor inures primarily to the benefit of such persons, must be determined by the terms of the original contract, and they are presumed to have notice of the existence and terms of such contract;[6] and in the absence of fraud or misrepresentations by the owner, this presumption is conclusive against them.[7] If, by the terms of the contract, the party who has failed to fulfill was to execute his note for the money due, payable at a future day, his failure to do so should be averred, for the ground of action against him is his failure to execute the note.[8]

§ 1225. **Against a Builder, for Defective Workmanship.**

Form No. 326.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the plaintiff and defendant entered into an agreement, of which a copy is hereto annexed [or state the terms of the contract].

[1] Cook v. Hamilton Co., 6 McLean, 112.

[2] Id. See also, to similar effect, Columbus R. R. Co. v. Indianapolis and Bellefontaine R. R. Co., 5 McLean, 450.

[3] Kalkman v. Baylis, 23 Cal. 303.

[4] Blakeney v. Evans, 2 Cranch, 185.

[5] Chesbrough v. N. Y. & Erie R. R. Co., 26 Barb. 9.

[6] Shaver v. Murdock, 36 Cal. 293.

[7] Henley v. Wadsworth, 38 Cal. 356.

[8] O'Connor v. Dingley, 26 Cal 11.

II. That the plaintiff duly performed all the conditions of the said agreement on his part.

III That defendant built [the bridge] referred to, in a bad and unworkmanlike manner [specifying wherein the work was not properly done], to the damage of the plaintiff..... dollars.

[DEMAND OF JUDGMENT.]

§ 1226. **Against a Builder, for not Completing, with Special Damage for Loss of Rent.**

Form No. 327.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ...., 18..., at ....., the plaintiff and the defendant entered into an agreement, under their hands and seals, of which a copy is annexed as a part of this complaint, marked "Exhibit A."

II. That the plaintiff duly performed all the conditions thereof on his part.

III. That the defendant entered upon the performance of the work under said contract, but has neglected to finish the said contract [state what he has neglected], and that although the time for the completion of the said building expired before commencement of this action, he neglects and refuses to complete the same.

IV. That the plaintiff, on the ..... day of ..... 18..., at ....., made an agreement with one A. B., whereby he agreed to let, and said A. B. agreed to hire, the said building for ..... months, from the ..... day of ....., 18..., to the ..... day of ....., 18.., at the monthly rent of ..... dollars, of which the defendant had notice.

V. That by reason of the defendant's failure to complete the contract aforesaid on his part, the plaintiff has been unable to give said A. B. occupancy thereof, and has been thereby deprived of the profits of said lease, to his damage ..... dollars, gold coin.

[DEMAND OF JUDGMENT.]

[Annex agreement, marked "Exhibit A."]

§ 1227. **Performance—Plans and Specifications—Variation.**—The unqualified refusal of a contractor to perform a part of the work on a building in actual progress of erection, is in itself a breach of the contract.[1] If a contract to do work provides that the work shall be done according to certain specifications, which are annexed to it, the specifications are a part of

[1] Thompson v. Laing, 8 Bosw. 482.

the contract.[1] If the contract is not annexed and made part of the complaint, the allegation should embody sufficient of the plan and specifications to show, in connection with the averment of the breach, in what particular the contract was broken.[2] An averment may be made sufficiently certain by introducing and referring to diagrams showing form and dimensions, etc.[3] Where the contract gives the employer the right to change the form and the material, the builder has not the right upon such a change to stop the work in an unfinished state, and thus arbitrarily annul the contract.[4] A written contract to furnish articles for a building, mentioning no time for performance, is to be performed in a reasonable time, and oral evidence that a certain time was agreed on by the parties is not admissible.[5]

§ 1228. **Breach of Contract—Damages—Excusable Delay.**—A covenant in a contract to erect and complete a building by a certain day, under a penalty of thirty dollars for every day same should remain unfinished, is not an absolute covenant to finish it on that day.[6] Where the plaintiff fails to perform by the day fixed, the defendant's consenting to his going on and completing the contract afterwards is no waiver of the right to recoup his damages for the delay.[7] One who has agreed to build a house on the land of another, and has substantially performed his contract, but has not completely finished the house, nor delivered it, when it is destroyed by fire, is liable in an action for money advanced upon the contract, and damages for its non-performance.[8] If the delay on the part of the contractor to perform the work is caused by want of readiness in the work performed by another contractor under an independent contract, he can not be held liable for a breach of his contract, nor forfeit his right to recover for what he has done.[9] Where a building contract contained a provision that the owner, on fifteen days' notice, might employ another to finish it, and pay therefor out of any money due the contractor, it was held that by failing to complete, the contractor forfeited only so much as the owner was obliged to pay to finish the building.[10]

[1] Taylor v. Palmer, 31 Cal. 241.
[2] Cooney v. Winants, 19 Wend. 504.
[3] Booker v. Ray, 17 Ind. 522
[4] Clark v. Mayor of New York, 4 N. Y. 358.
[5] Strange v. Wilson, 17 Mich. 342.
[6] Farnham v. Ross, 2 Hall, 167.
[7] Barber v. Rose, 5 Hill, 76.
[8] Andrews v. Durant, 11 N. Y. 35; Hefford v. Alger, 1 Taunt. 218; Merrit v. Johnson, 7 Johns. 473; Adams Nichols, 19 Pick. 275; Harmony v. Bingham, 12 N. Y. 99; School District v Douchy, 25 Conn. 530; 3 Dutch. 514; Tompkins v. Dudley, 25 N. Y. 272.
[9] Stewart v. Ketcltas, 9 Bosw. 261.
[10] Foley v. Gough, 4 E. D. Smith, 724.

CHAPTER II.

ON CHARTER PARTIES.

§ 1229. **Owner against Freighter for not Loading.**

Form No. 328.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the..... day of....., 18..., at....., the plaintiff and defendant entered into an agreement, a copy of which is hereto annexed.

[Or, I. That on the ..... day of ....., 18...., at ....., the plaintiff and defendant agreed by charter party that the defendant should deliver to the plaintiff's ship "Flying Scud," at ....., on the ..... day of ....., 18...., four hundred and fifty tons of wheat, which she should carry to London, England, and there deliver on payment of four thousand dollars freight; and that the defendant should have ten days for loading, five days for discharge, and three days for demurrage, if required, at fifty dollars per day.]

II. That at the time fixed by the said agreement the plaintiff was ready and willing and offered to receive the said merchandise [or the merchandise mentioned in the said agreement] from the defendant.

III. That the period allowed for loading and demurrage has elapsed, but the defendant has not delivered the said merchandise to the said vessel.

Wherefore the plaintiff demands judgment for ..... dollars for demurrage, and ..... dollars additional for damages.

§ 1230. **Charter Party Defined** —A charter party is a contract by which the owner lets his vessel to another for freight.[1] Any contract founded on an illegal voyage partakes of the character of that voyage, and stands or falls with it.[2]

§ 1231. **Measure of Damages.**—The measure of damages against a charterer who refuses to furnish a cargo according to his contract is the stipulated price, deducting the net earnings of the vessel during the time she has been occupied on the voyage, at an average passage, and including the lay days.[3] If the freighter only partially fulfills his contract, the owner may re-

[1] Spring v. Gray's Ex'rs, 6 Pet. 151, 164.
[2] Colquhoun v. N. Y. Fireman's Ins. Co., 15 Johns. 352.
[3] Ashburner v. Balchen, 7 N. Y. 262.

cover for the dead freight his contract price; but the owner is bound to take other freight if offered, though at a less price, and can recover only the difference in price.[1]

§ 1232. **Demurrage, Allegation for.**

Form No. 329

That the defendant detained the ship ..... days beyond the periods so agreed on for loading, discharging, demurrage, as aforesaid, whereby the plaintiff, during all that time, was deprived of the use of the ship, and incurred ..... dollars expense in keeping the same and maintaining the crew thereof.

§ 1233. **Demurrage, Damages for.**—Although demurrage, properly so called, is only payable when it has been stipulated, yet if a vessel is improperly detained, the owner may have a special action for the damage.[2] It is the duty of the charterers to restore the ship at the end of the period allowed for the demurrage, but they are not responsible for an unreasonable delay by the master.[3] And one who purchases goods arriving in bond, is not liable for demurrage of the vessel for the detention occurring before the seller obtains legal permit for the delivery.[4] No demurrage can be recovered by an owner for a detention occasioned either by the misconduct of the master, for which the owner alone was answerable, or to avoid danger, and not by any misconduct or any breach of covenant by the charterer.[5]

§ 1234. **Distinction between Contracts of Hiring and Affreightment.**—An agreement to hire a vessel in any legal trade for a specified period, with covenants for her seaworthiness, and that the hirer should pay by the time, and not by the carrying of goods on the voyage, is a hiring of the vessel, and not a contract of freight.[6]

§ 1235. **Duties of Master.**—Where a charter party allows a charterer a number of "lay days," and neither the consignees nor other persons receive the cargo or pay the freight after arrival at the port of destination, the master, acting as sole agent on behalf of both charterer and owner, is bound to sell the cargo and pay the freight, on expiration of the "lay days," but he is not bound to sell before the expiration of the "lay days."[7]

[1] Abb. on Shipping, 428; Heckscher v. McCrea, 24 Wend. 304.

[2] Abb. on Shipping, 304; Clendaniel v. Tuckerman, 17 Barb. 184.

[3] Robbins v. Codman, 4 E. D. Smith, 315.

[4] Gillespie v. Durand, 3 E. D. Smith, 531.

[5] Hooe v. Groverman, 1 Cranch, 214.

[6] Winter v. Simonton, 3 Cranch C. Ct. 104; see also Donahoe v. Kettell, 1 Cliff. 135; Husten v. Richards, 44 Me. 182.

[7] Robbins v. Codman, 4 E. D. Smith, 315.

§ 1236. **Interpretation of Contract.**—In the construction of charter parties, it must be remembered that they are often informal, and must have a liberal construction, in furtherance of the real intention of the parties and the usage of the trade.[1] And though the owner of a ship, of which the charterer is freighter only, has a lien upon the cargo for freight, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as waived, without express words to that effect, if there are stipulations in the charter party inconsistent with the exercise of the lien, or when it can fairly be inferred that the owner meant to trust to the personal responsibility of the charterer.[2]

§ 1237. **Mode of Stowage.**—Where no mode of stowage is prescribed in the charter party, the usage of trade will obtain, and the owner will not be liable for damages resulting therefrom.[3]

§ 1238. **Lay Days.**—Under a charter party, the lay days of a vessel, by the general rule, commence to run from the time the vessel enters the dock.[4] Where the delivery, by the terms of the charter party, was to be made "alongside of the plaintiff's vessel, within reach of her tackles," it was held, that if the master was directed to take the vessel to a certain dock, and did so, the lay days commenced to run from the day she was taken there, and was in readiness alongside the dock to receive her cargo. A charter party provided for "lay days" as follows: to load twenty days from the twelfth instant, the owner guaranteeing to have the vessel ready by that time; and by a subsequent stipulation the charter party was to commence when the vessel was to receive cargo, and notice thereof should be given to the charterer. The readiness of the vessel at the day named was a condition precedent to the charterer's liability to accept and employ her, and the charter party commences on notice that the vessel is ready to received the cargo.[5] Where no "lay days" are provided in the charter party or bill of lading, and there is no

[1] Abb. on Shipping (Story's ed.) 188; 3 Kent's Com. 201 et seq.; Ruggles v. Buckner, 1 Paine, 358; 1 Sumn. 551; Certain Log etc. v. Richardson, 2 Id. 589; Gracie v. Palmer, 8 Wheat. 605, 634; Raymond v. Tyson, 17 How. U. S. 53.

[2] Paine, 363; Chandler v. Belden, 18 Johns. 157, 162; Abb. on Shipping, 178; Lucas v. Nuckells, 4 Bing. 729; Cowell v. Simpson, 16 Ves. 275; Chase v. Westmore, 5 Mau. & Sel. 180; Crawshay v. Hamfray, 4 Barn. & Ald. 52; Raymond v. Tyson, 17 How. U. S. 53. As to the construction of charter parties in peculiar cases, see Ogden v. Parsons, 37 Hunt's Merchant's Mag. (Dec. 1857), 710; Belmont v. Tyson, 36 Id. (Feb. 1857), 202; Freeman v. A Cargo of Salt, 40 Id. (April, 1859), 457.

[3] Lamb v. Parkman, Sprague, 343;

[4] 1 Pars. Mar. L. 262; Rowe v. Smith, 10 Bosw 238.

[5] Weisser v. Maitland, 3 Sandf. 318.

express stipulation as to the time of unloading, the consignee is not liable for delays occurring without his fault.[1]

§ 1239. **Liability of Charterer.**—Where, by the terms of the charter party, the charterer was to return the boats "in as good condition as they now are, with the exception of the ordinary use and wear," he is not liable as an insurer against the perils of the sea or risks of navigation.[2]

§ 1240. **Negligence, Liability for.**—If persons charter a steamboat generally, they are owners, in respect to liability for negligence in running her. If the contract is one of affreightment merely, they are not such owners.[3]

§ 1241. **Owner for Voyage.**—If, by the terms of the charter party, the charterers are to have exclusive possession, control, and management of the vessel, appoint master, run the vessel, and receive the entire profits, they are the owners, and are alone responsible for damages and contracts.[4] And the charterers' right of possession may be lost by a voluntary surrender to the owners.[5]

§ 1242. **Power of Master.**—The master of the vessel may make a charter party, where the owner has no agent in a foreign port, for the benefit of the owner, but not to give a creditor of the owner a security of the debt due to him.[6]

§ 1243. **Refusal to Overload.**—Although the charter party lets the entire capacity of the vessel, if the goods put on board are heavy articles, and before the ship is full sink her as low as is usual and proper without extra danger, the owners or master of the vessel do not, by refusal to take more, violate the charter party.[7]

§ 1244. **Repairs of Vessel.**—A breach of a clause in the charter party, binding the charterer to keep the vessel in repairs, should be alleged in the complaint in an action by owners of a vessel against charterer.[8]

§ 1245. **Rescission.**—Where two persons chartered a vessel for six months, and after a part of the time had passed, the

[1] The Glover, 1 Brown Adm. 166.

[2] Story on Bailm., sec. 35; Brown's Leg. Max. 187; Ames v. Belden, 17 Barb. 514.

[3] Sherman v. Fream, 30 Barb. 478.

[4] Gracie v. Palmer, 8 Wheat. 632; Marcordier v. Chesapeake Ins. Co., 8 Cranch, 39; Abb. on S. (Eng. ed.) 57, note 1; Id. 288, 289; 1 Sumn. 566, 567; Kleine v. Catara, 2 Gall. 75; Hill v. The Golden Gate, 1 Newb. 308; Winter v. Simonton, 3 Cranch C. Ct. 104. A charter party examined, and held not to have had the effect of transferring the ownership and possession from the general owners: Clarkson v. Edes, 4 Cow. 470; Mactaggar v. Henry, 3 E. D. Smith, 390; Holmes v. Pavenstedt, 5 Sandf. 97.

[5] Bergen v. Tamined, 40 Hunt's Merch. Mag. 708.

[6] Hurry v. Hurry, 2 Wash. C. C. 145.

[7] Weston v. Minot, 3 Woodb. & M. 436.

[8] Coster v. N. Y. and Erie R. R. Co., 3 Abb. Pr. 332.

owner agreed with one of the charterers, in writing, that the charter party was to be deemed to have expired, it was held a valid rescission of the contract.[1]

§ 1246. **Running Days.**—A provision in the charter party for running days is in effect a positive stipulation by the freighter that he will load and unload within the time mentioned, and inevitable accident does not excuse him.[2]

§ 1247. **Charterer against Owner, for Deviation from Contract, and Abandonment of Voyage.**

Form No. 330.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff and defendant agreed, by charter party, that the defendant's ship, called the ....., then at ....., should sail to ....., or so near there as she could safely get, with all convenient speed, and there load a full cargo of .. .., or other lawful merchandise, from the factors of the plaintiff, and carry the same to ....., and there deliver the same, on payment of freight.

II. That the plaintiff duly performed all the conditions of the contract on his part.

III. That the said ship, the ....., did not, with all convenient speed, sail to ....., or so near thereto as she could safely get; but that the defendant caused the said ship to deviate from her said voyage, and abandon the same, to the plaintiff's damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1248. **Assent of Charterer.**—Where a chartered vessel met another vessel in distress in the course of her voyage, and one of the charterers, being on board, consented that a part of the crew might go on board the distressed vessel to assist in saving her, the assent of the charterer would not vary the contract respecting the freight.[3]

§ 1249. **Deviation.**—On a voyage from South America to Boston, stopping at New York may be such a deviation as would render the charterer liable for damage it might occasion. Yet it is not such a change as will dissolve the charter party and entitle the owner to possession at New York, and to retain cargo for freight, though the charterer has become insolvent.[4]

[1] Wheeler v. Curtis, 11 Wend. 653.
[2] Field v. Chase, Hill & D. Supp. 50.
[3] Mason v. Blaireau 2 Cranch, 240.
[4] Lander v. Clark, 1 Hall, 394.

§ 1250. **Negative Allegations.**—If there are exceptions in the charter party, allegations tending to negative the same are not necessary.[1]

§ 1251. **Ship Owner Against Charterer for Freight.**

Form No. 331.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff and defendant agreed, by charter party, that the plaintiff's ship, called ....., should, with all convenient speed, sail to ....., and that the defendant should there load her with a full cargo of ....., or other lawful merchandise, to be carried to ....., and there delivered, on payment by the defendant to the plaintiff of freight, at ..... dollars per ton.

II. That the said ship accordingly sailed to ....., aforesaid, and was there loaded by the defendant with a full cargo of lawful merchandise, and the plaintiff carried the said cargo in said ship to ..... aforesaid and there delivered the same to the defendant, and otherwise performed all the conditions of said contract on his part.

III. That said freight amounted in the whole to the sum of ..... dollars.

IV. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.]

§ 1252. **Allegation against Assignee of Cargo.**

Form No. 332.

That thereafter the said A. B. assigned the cargo to the defendant, who thereupon became the owner thereof and entitled to receive the same.

§ 1253. **Allegation of a Charter.**—The plaintiffs alleged in their complaint that their assignors having chartered a vessel, earned freight, which the defendants, the consignees of the vessel had collected and refused to pay over. The defendants, in their answer, denied that the plaintiff's assignors had chartered the vessel in any other way than by a charter party, which provided that their right to any share of the freight should be contingent on the freight exceeding twenty-five thousand dollars; it was held that this put in issue of plaintiff's allegation of a charter, and that the plaintiffs must prove, either an unconditional charter, or that under the charter alleged by defendants the freight had exceeded twenty-five thousand dollars.[2]

[1] Wheeler v. Bavidge, 9 Exch. 668; S. C., Eng. Law & Eq. 541.
[2] Patrick v. Metcalf, 9 Bosw. 483.

§ 1254. **Lien for Freight.**—The right of lien for freight does not absolutely depend on any covenant to pay freight on the delivery of the cargo.[1] Nor can charterers, with the consent of the master abroad, make any agreement exonerating the goods from freight, and defeating the lien of the owners.[2] Nor can the master enter into such agreement, and such agreements would give no rights to a person who entered into them with the knowledge of the charter party.[3] But the master, notwithstanding the interference of the charterer, may retain the goods until his lien shall be satisfied, or may sue the consignee after delivery of the the goods.[4]

§ 1255. **Sale of Cargo.**—Where owners of cargo did not appear, and the master put up at auction and sold the cargo on due notice, and became the purchaser, but retained the goods on the vessel, awaiting a higher price, he had no right thus to constitute the ship a storehouse, and the charterer was not liable for demurrage, beyond a reasonable time for discharging after the first sale.[5]

CHAPTER III.

COVENANTS.

§ 1256. **Warranty of Title to Real Property.**

Form No. 333.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18...., at ....., the defendant, in consideration of ..... dollars to him paid, granted to the plaintiff, by deed [here insert description], and in his said deed warranted that he had good title in fee simple to the said property, and would defend the plaintiff in his possession of the same.

II. That the defendant was not, but one A. B. was then the lawful owner of the said lands, in fee simple.

III. That on the ..... day of ....., 18..., the said A. B. lawfully evicted the plaintiff from the same, and still withholds the possession thereof from him.

[DEMAND OF JUDGMENT.]

[1] Abb. on Sh., pt. 3, c. i. sec. 7, p. 177; The Volunteer, 1 Sumn. 551.

[2] Gracie v. Palmer 8 Wheat. 605; reversing Palmer v. Gracie, 4 Wash. C. Ct. 110.

[3] The Salem's Cargo, 1 Sprague, 389.

[4] Gracie v. Palmer, 8 Wheat. 605; 3 Kent (3d. ed.), 138, 210. 220; Abb. on Sh. 286–8; Smith Merc. Law, 187; Shaw v. Thompson, Ole. 144.

[5] Robbins v. Codman, 4 E. D. Smith, 315.

§ 1257. **Action on Covenant—Assignment of Breach.**—In order to enable one to maintain an action on a covenant, there must not only be a breach of the covenant, but some loss or damage to the covenantee.[1] The covenant of quiet enjoyment and of general warranty requires the breach to show an eviction.[2] Covenants are to be considered dependent on or independent according to the intention of the parties, which is to be deduced from the whole instrument.[3] Where covenants are dependent, an action can not be maintained without showing a performance on plaintiff's part of every affirmative covenant.[4] That a party covenanted by indenture, imports that a covenant was under seal;[5] and an averment of execution imports delivery.[6] The grantee in a deed-poll is bound by the covenants therein contained to be performed by him, and an action of covenant lies for a breach thereof. By acceptance of such a deed, the grantee is estopped from denying his covenants, or that the seal attached to the deed is his own as well as the grantor's.[7] Even if an action of covenant will not lie in such case against the grantee, a court of equity will restrain him or his grantees from doing what, by such covenant, he has agreed not to do.

§ 1258. **Eviction, Allegation of.**

Form No. 334.

That the defendant has not warranted and defended the premises to the plaintiff; but, on the contrary, one C. D. lawfully claimed the same premises by a paramount title, and afterwards, in an action brought by him in the superior court of the county of ....., state aforesaid, in which said C. D. was plaintiff, and this plaintiff was defendant, the said C. D., on the ..... day of ....., 18.., recovered judgment, which was duly given by said court against this plaintiff, for his seisin and possession of the premises, and on the ..... day of ....., 18.., lawfully entered the premises, and ousted the plaintiff therefrom, and still lawfully holds the plaintiff out of the possession thereof.

§ 1259. **Eviction, What is—Averment of.**—Eviction by process of law is not necessary to enable an action to be maintained on the covenant.[9] And an averment that the vendor had

[1] Swall v. Clarke, 51 Cal. 227.
[2] Rickert v. Snyder, 9 Wend. 416; Marston v. Hobbs, 2 Mass. 433.
[3] Philadelphia R. R. Co. v. Howard, 13 How. (U. S.) 307, 339.
[4] Webster v. Warren, 2 Wash. C. Ct. 456.
[5] Cabell v. Vaughan, 1 Saund. 291; Phillips v. Clift, 4 Hurlst. & N. 168.
[6] Brinckerhoff v. Lawrence, 2 Sandf. Ch. 400.
[7] Atlantic Dock Co. v. Leavitt, 54 N. Y. 35.
[8] Id.
[9] McGary v. Hastings, 39 Cal. 360.

not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law, is sufficient.[1] In a declaration upon a covenant of warranty, it is necessary to allege substantially an eviction by title paramount; but no formal terms are prescribed in which the averment is to be made.[2] A purchaser in possession can not reclaim the purchase money on account of defect in the title, unless he has been evicted or disturbed.[3] Nor on the ground that the title existed elsewhere than in the grantor.[4] That the plaintiff was lawfully evicted from the right and title to said premises by a paramount and lawful title to the same, does not import an ouster from possession.[5] Where the covenantee is held out of possession by one in actual posses ion under a paramount title, the covenant is broken.[6] The use of a right of way by the party entitled to it, is an eviction of the servient estate, within a covenant of warranty against all "lawful claims," for which the latter may sue as assignee of the covenantee.[7]

§ 1260. **Judgment Covenants.**—Where the parties to a deed covenanted severally against their own acts and incumbrances, and also to warrant and defend against their own acts and those of all other persons, with an indemnity in land of an equivalent value, in case of eviction, these covenants are independent, and it is unnecessary to allege in the declaration any eviction, or any demand, and refusal to indemnify with other lands, but it is sufficient to allege a prior incumbrance by the acts of the grantors, etc.; and that the action might be sustained on the first covenant for the recovery of pecuniary damages.[8]

§ 1261. **General Covenant of Warranty.**—If a deed contains a general covenant of warranty of lands thereby intended to be conveyed, and also a covenant that if any portion of the land has been before conveyed to other persons, the grantor will convey to the grantee other lands of like quality, the former covenant relates to land which the deed purports to convey, and not to the land which the grantor covenanted to convey in the latter covenant.[9] Where land is sold with covenant of warranty, accompanied with delivery of possession, and

[1] Day v. Chism, 10 Wheat. 449.
[2] Rickert v. Snyder, 9 Wend. 416; Day v. Chism, 10 Wheat. 449.
[3] Salmon v. Hoffman, 2 Cal. 138.
[4] Fowler v Smith, 2 Cal. 44.
[5] Blydenberg v. Cotheal, 1 Duer, 176.
[6] Whity v. Hightower, 12 Smed. & M. 478.
[7] Russ v. Steele, 40 Vt. 310.
[8] Duvall v. Craig, 2 Wheat. 45.
[9] Vance v. Pena, 33 Cal. 631.

the purchaser gave a note in payment, the warranty and the promise to pay are independent covenants.[1] A covenant of the grantor, warranting the title of the land sold as "indisputable and satisfactory," is not broken if the title is good and valid.[2] A covenant of non-claim in a deed amounts to a covenant of warranty, and operates equally as an estoppel.[3] The covenant of warranty runs with the land, and the vendor is liable directly to the person evicted.[4] Where a covenant of warranty is based upon a right or title, which is subsequently, by a judgment of the court, adjudged invalid, and five years are given by statute to appeal from said judgment, an action for breach of the covenant will not lie till the five years have expired.[5]

§ 1262. **Notice of Action.**—Verbal notice is sufficient.[6] If the covenantor has notice of the action, the covenantee is not bound to defend.[7] The proceedings will be conclusive against the covenantor in this action.[8]

§ 1263. **Remedy.**—If a party takes a conveyance without covenants, he is without remedy in case of failure of title; and if he takes a conveyance with covenants, his remedy upon failure of title is confined to them.[9]

§ 1264. **Special Damages—Allegation of.**

Form No. 335.

That by reason thereof the plaintiff has not only lost said premises, but also the sum of ..... dollars, by him laid out and expended in and upon the said premises, in repairing and improving the same, and also the sum of ..... dollars, costs and charges sustained by the said A. B., in prosecuting his action for the recovery thereof, and the sum of ..... dollars, for his own costs, charges, and counsel fees in defending said action.

§ 1265. **Breach of Covenant of Warranty—Another Form.**

Form No. 336

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant, by his deed of that date, duly executed, in consideration of ..... dollars, sold and conveyed in fee simple, to the plaintiff, certain land [describe it].

[1] Norton v. Jackson, 5 Cal. 263.
[2] Winter v. Stock, 29 Cal 407.
[3] Gee v. Moore, 14 Cal. 472.
[4] Blackwell v. Atkinson, 14 Cal. 470
[5] Hills v. Sherwood, 33 Cal. 474.
[6] See Kelly v. Dutch Church of Schenectady, 2 Hill, 105.
[7] Jackson v. Marsh, 5 Wend. 44.
[8] Cooper v. Watson, 10 Id. 202.
[9] Peabody v. Phelps, 9 Cal. 213.

II. That the defendant, by the same deed, covenanted as follows [copy the covenant].

III. That the defendant had not, at the time of the execution of said deed, a good and sufficient title to said premises, and by reason thereof, on the ..... day of ....., 18..., at ....., the plaintiff was ousted and dispossessed of the said premises by due course of law.

[Or, III. That one G. H., at the time of the execution of the said deed and from thence, had lawful right and paramount title to the said premises, and by virtue thereof, after the execution of said deed, on the ..... day of ....., 18..., entered upon the possession thereof, and ousted and dispossessed by due process of law, and kept, and still keeps, the plaintiff from the possession of the same. That the plaintiff has also been compelled to pay the costs and charges sustained by the said G. H., in prosecuting a certain action in the ..... court, in ..... county, for the recovery of said premises, which amounted to ..... dollars, and to pay out the additional sum of ..... dollars in endeavoring to defend such action.]

[Demand of Judgment.]

§ 1266. **By Assignee of Grantee against Previous Grantor.**

Form No. 337.

[Title.]

The plaintiff complains, and alleges:

I. [Allege sale to one C. D.]

II. [Allege and set out copy of covenant.]

III. That the said C. D. afterwards, on the ..... day of ....., 18..., at ....., by deed duly executed, in consideration of the sum of ..... dollars, conveyed the said premises to one E. F., his heirs and assigns; and the said E. F. afterwards, on the ..... day of ....., 18..., at ....., by his deed of that date, duly executed, in consideration of the sum of ..... dollars, conveyed the same premises to the plaintiff.

IV. That the plaintiff afterwards, on the ..... day of ....., 18..., at ....., entered into and was possessed of said premises.

V. That the defendant had not at the time of the execution of his said deed. nor has he since had, a good and sufficient title to the said premises; by reason whereof the plaintiff was afterwards, on the ..... day of ....., 18..., ousted and dispossessed of the said premises by due course of law.

[Demand of Judgment.]

§ 1267 By Heirs of Covenantee against Previous Grantor.

Form No. 888.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege sale as preceding forms.]

II. [Allege and set out copy of covenant.]

III. That the said C. D. afterwards, and on the same day, entered into and was possessed of said premises, and afterwards, on the ..... day of ..... 18..., at....., said C. D. died, whereupon the said premises, and his estate therein, descended to the plaintiffs, as children and co-heirs of the said C. D., deceased; and that they afterwards, on the same day, entered into and were possessed of said premises, until ousted and dispossessed, as hereinafter mentioned.

[Here set forth the breach, etc., as in the preceding forms.]

[DEMAND OF JUDGMENT.]

§ 1268. By Devisee of Covenantee, against Previous Grantor.

Form No. 889.

[TITLE.]

The plaintiff complains, and alleges:

I. and II. [Allege sale and covenant.]

III. That the said E. F., afterwards, and on the same day, entered into and was possessed of said premises; and afterwards, on the.....day of....., 18.., at....., made his last will and testament, in writing, and thereby, amongst other things, devised the said premises to the plaintiff; and afterwards, on the.....day of ....., 18.., at....., the said E. F. died, leaving such will.

IV. That on the ..... day of ....., 18.., the said will was proved and admitted to probate in the probate court of, etc., and by order of said court, letters testamentary were issued. [If the property is situated in a county other than the one where the will was admitted to probate, add: That afterwards, on the ..... day of....., 18.., by an order of the probate court of .....county (where the premises are situated), an authenticated copy of said will, from the record aforesaid, with a copy of said order of probate annexed thereto, was filed of record in the probate court of said county of ..... (where premises lie), and duly recorded.]

V. That thereupon the plaintiff entered into possession of the said premises, and was possessed thereof until ousted and

dispossessed as hereinafter mentioned. [Set forth breach, etc. as in preceding forms.]

[DEMAND OF JUDGMENT.]

§ 1269. Warranty as to Quantity.

Form No. 340.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of....., 18..., at ....., the defendant warranted a certain farm in ..... township, ... county, state of ....., to contain ..... acres of land, and thereby induced the plaintiff to purchase the same from him, and pay to him ..... dollars therefor.

II. That the said farm contained only ..... acres, instead of ..... acres, the quantity sold to plaintiff by defendant.

III. That plaintiff was damaged thereby in the amount of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1270. On Covenant Against Incumbrances on Real Property.

Form No. 341.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . day of ....., 18..., at ....., the defendant, in consideration of ..... dollars, to him paid, granted to the plaintiff, by deed, in fee simple, a farm in the town of ....., county of ..... [or otherwise briefly designate the property].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy [copy of covenant].

III. That at the time of the making and delivery of said deed the premises were not free from all incumbrance, but on the contrary, the defendant before that time, on the ..... day of ....., 18..., at ....., by deed in the nature of a mortgage, duly executed, had mortgaged the said premises to one R. S., to secure the payment of ..... dollars, with interest.

IV. And for a further breach, the plaintiff alleges, that on the ..... day of ....., 18..., in the ..... court of the ..... judicial district of ..... county, in this state, judgment was rendered against the defendant for the sum of ..... dollars, in an action in which the said [incumbrancer] was plaintiff, and the defendant herein was defendant, which judgment was, on the ..... day of ....., 18..., docketed in said county of [where premises are situated] and which judgment at the time

of the execution and delivery of the deed in the nature of a mortgage, remained unpaid and unsatisfied of record.

V. And for a further breach, the plaintiff alleges, that at the time of the execution and delivery of said deed the premises were subject to a tax theretofore duly assessed, charged, and levied upon the said premises by the said city of ....., and the officers thereof, of the sum of ..... dollars, and which tax was then remaining due and unpaid, and was at the time of the delivery of said deed a lien and incumbrance by law upon the said premises.

VI. That by reason thereof the plaintiff paid, on the ..... day of ....., 18..., the sum of ..... dollars in extinguishing the [here state what, whether the judgment, lien, tax, or other incumbrances, or all of them] aforesaid, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1271. **Assignment of Breach—Payment by Covenantee.**—A breach of covenant is sufficiently assigned by negativing the words of the covenant.[1] If the special facts to negative a covenant are necessarily included in the general averment of the breach, a distinct and substantive averment of them is not necessary.[2] A general covenant against incumbrances is broken by the existence of an incumbrance at the making of the deed. The breach must set out the particular incumbrance relied on.[3] That certain persons recovered judgment against the owner, which were liens and incumbrances, is sufficient, without stating the fact of docketing said judgment, or its legal effect.[4] A covenant that the whole amount of a judgment is due is not to be construed to mean that no one of the judgment debtors has been released.[5] When an action is brought on the breach of a covenant in the contract, it is enough to allege the conveyance according to its legal effect, showing a consideration for the covenant, and then set forth a copy of the covenant,[6] thus combining the two systems of pleading for the sake of brevity. This method will be desirable when the contract is of great length. So, in a covenant to pay certain accounts, it is not necessary to set out the ac-

[1] McGeehan v. McLaughlin, 1 Hall, 87.

[2] Randall v. C. and D. Canal Co., 1 Harr. 151; Breckenridge's Adm'r v. Lee's Ex'rs, 3 Bibb, 330.

[3] Shelton v. Pease, 10 Mo. 473; Julliand v. Burgott, 11 Johns. 6; Thomas v. Van Ness, 4 Wend. 549; compare People v. Russell, Id. 570

[4] Cady v. Allen, 22 Barb. 388; see, also, Chamberlain v. Gorham, 20 Johns. 746; reversing S. C., 20 Id. 144.

[5] Bennett v. Buchan, 5 Abb. Pr. (N. S.) 412.

[6] Swan on Pl. 198.

counts so paid, thereby producing great prolixity.[1] Where a complaint avers a sale and conveyance, the existence of the mortgage, the execution of the bond, the failure of the defendant to comply with its conditions, consequent sale of the premises under the mortgage, and their loss to the plaintiff, it was held sufficient on demurrer.[2] And consideration need not be alleged, as in pleading on a sealed instrument the seal imports consideration. Without the averment of payment of the incumbrance, plaintiff can recover only nominal damages.[3] Except in the case of a covenantee who bought for the purpose of a resale, with notice to the covenantor at the time of sale.[4] In such a case those facts, and the diminution in value of the estate, and the expenditure in paying off the incumbrance, should be alleged, the latter as a special averment of damage.[5]

§ 1272. **The Same—Description of Land Conveyed.**—A brief description will be sufficient with profert of conveyance.[6]

§ 1273. **Condition Precedent.**—Where a deed contains a covenant that in case the guarantees shall pay a certain sum of money before a certain day "then this instrument is to take effect as a full and complete conveyance in fee of all, etc., take the estate belonging to the covenantor, etc., the payment of the purchase money was a condition precedent to vesting the estate.[7]

§ 1274. **Covenant in Mortgage.**—If the mortgagor covenants to pay and discharge all legal mortgages and incumbrances, the covenant will make the mortgagor personally liable for the sum due and secured by an executory contract for a mortgage not under seal or recorded if the mortgagor had actual notice of it, and the mortgage will become security for the performance of the covenant.[8] It does not put the purchaser from the mortgagor upon any inquiry as to any mortgages or incumbrances not of record.[9]

§ 1275. **Measure of Damages.**—A party having been defeated in a suit against him for damages for having interfered with an easement on his land may recover of his warrantor the damage he has sustained in consequence of the breach of the covenant against incumbrances, and such costs and expenses as

[1] Jones v. Hurbaugh, 5 N. Y. Leg. Obs. 19.
[2] McCarty v. Beach, 10 Cal. 461.
[3] Delavergne v. Norris, 7 Johns. 358; Hall v. Dean, 13 Id. 105; Stanard v. Eldridge, 16 Id. 254.
[4] Batcheldor v. Sturgis, 3 Cush. 201.
[5] De Forest v. Leete, 16 Johns. 122.
[6] 1 Saund. 233, n. 2; 2 Chit. Pl. 192, n. i; Dunham v. Pratt, 14 Johns. 372.
[7] Mesick v. Sunderland, 6 Cal. 297.
[8] Racouillat v. Sansevain, 32 Cal. 376.
[9] Racouillat v. Rene, 32 Cal. 450.

he has fairly and in good faith incurred in attempting to maintain and defend his title.[1] He was not bound to follow the advice of his warrantor by suing the party who claimed the easement and entered upon the premises.[2] "There is," says Lord Mansfield, in Lowe v. Peers, "a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election; he may either bring an action of debt, and recover the penalty, after which recovery of the penalty he can not resort to the covenant; or, if he does not choose to go for the penalty, he can proceed upon the covenant and recover more or less than the penalty *toties quoties*."[3]

§ 1276. **Estoppel.**—One who has covenanted with executors, as such, that third persons should satisfy and discharge a mortgage, is thereby estopped from denying the right of executors to sue on such covenant in their representative capacity.[4] But a subsequent grantee may maintain an action against the grantor on a covenant.[5]

§ 1277. **Incumbrances.**—The term "incumbrances" includes taxes, assessments, and all liens upon property.[6] No tax or assessment can exist until the amount thereof is ascertained and determined. Hence, although the expense has been incurred at the time of conveyance, to meet which a local assessment is subsequently laid upon the premises conveyed which are legally chargeable therewith, such assessment does not constitute a breach of the covenant against incumbrances.[7] Only nominal damages can be recovered until after actual payment of the incumbrance.[8]

§ 1278. **Purchase after Breach.**—A purchaser of a mill, after breach of covenant by a railroad company, with its former owner, to dig a new channel, etc., for the mill stream, can not sue on said covenant.[9] Where defendant made a valid agreement with three partners not to do business in a certain place, and two of said partners sold out to a third, and left said place, but the third resold to defendant, and released said agreement,

[1] Smith v. Sprague, 40 Vermont, 43.

[2] Id.

[3] Sedgwick on Damages, 424; see Lowe v. Peers, 4 Burr. 2225; also Bird v. Randall, 1 W. Black. 373, 387; Winter v. Trimmer, 1 Id. 395; Harrison v. Wright, 13 East. 343. The use and meaning of the terms "penalty" and "liquidated damages" in agreements commented on in People v. Love, 19 Cal. 677.

[4] Farnham v. Mallory, 5 Abb. Pr. (N. S.) 380.

[5] Colby v. Osgood, 29 Barb. 339.

[6] Civil Code Cal., sec. 1114.

[7] Dowdney v. Mayor etc., 54 N. Y. 186; see De Peyster v. Murphy, 39 N. Y. Supr. (7 J. & Sp.) 255.

[8] Reading v. Gray, 37 Id. 79; see also Blythe v. Gately, 51 Cal. 236, as to when taxes become a lien.

[9] Junction R. R. Co. v. Sayers, 28 Ind. 318.

it was held that the other two partners could not sue for a breach, as the agreement was incident only to the business.[1]

§ 1279. **To What Covenant Attaches.**—Every covenant relating to the thing demised attaches to the land, and runs with it.[2] But where the warranty in a deed contains a covenant to "warrant and defend the premises conveyed, from and against all or any incumbrances, claims or demands, created, made, or suffered, by, through, or under him, and against none other," the warranty in the deed attaches itself to the interest conveyed, and not to the land itself.[3] A covenant of seisin runs with the land and is divisible, so that if the land be sold in parcels to different purchasers, each may maintain an action on the covenant.[4] Where the covenantee, in a deed of land, takes possession and conveys, a covenant of warranty in the deed to him will pass to his grantee, although the covenantor was not in possession at the time of his conveyance.[5] A covenant to convey, contained in a lease, runs with the land and may be assigned.[6]

§ 1280. **The Same, where the Deed Expressed Specific Incumbrance.**

Form No. 342.

[Title.]

The plaintiff complains, and alleges:

I. [As in preceding form.]

II. That by said deed the premises conveyed were described as being subject, nevertheless, to the payment of a certain mortgage recorded in the recorder's office at ....., on the ..... day of ....., 18.., in Book A of mortgages [or other incumbrance, describing it], and no other incumbrances were mentioned or specified in said deed, as existing upon or affecting said premises or the title thereto.

III. That said deed contained a covenant on the part of the defendant, of which the following is a copy [copy covenant].

IV. That at the time of the making and delivery of the said deed, the premises were not free from all incumbrances other than the mortgage therein excepted, but on the contrary [here set out any or all other incumbrances as breaches, and conclude as in preceding form].

[Demand of Judgment.]

[1] Gompers v. Rochester, 56 Penn. St. 194.

[2] Laffan v. Naglee, 9 Cal. 662.

[3] Kimball v. Semple, 25 Cal. 440.

[4] Schofield v. The Homestead Co., 32 Iowa, 317.

[5] Weed v. Larkin, 54 Ill. 489.

[6] Hagar v. Buck, 44 Vt. 285. When covenant to make and maintain fence runs with the land, see Bronson v. Coffin, 108 Mass. 175.

§ 1281. **Implied Covenant.**—Where a deed containing the words "grant, bargain, and sell," recites a mortgage existing at the time of the conveyance, with a warranty against the same, the general covenant implied by the words, "grant, bargain and sell," is restrained by the special covenant.[1] And the special covenant is not a covenant to pay the mortgage.

§ 1282. **Mortgage.**—When premises are described in the granting part of a deed as subject to a mortgage, such mortgage will not be in the covenant against incumbrances.[2] A covenant by a vendor of real estate, that neither he nor his assigns will sell any marl from the adjoining premises, will not be enforced in equity against the alienee of the land intended to be burdened with the covenant.[3]

§ 1283. **On a Covenant of Seisin, or of Power to Convey.**

Form No. 343.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of....., 18..., the defendant, for a valuable consideration, by deed, conveyed to the plaintiff in fee simple [describe the property].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy [copy of covenant].

III. That at the time of the execution and delivery of said deed, the defendant was not the true, lawful, and rightful owner, and had not in himself at said time good right, full power, etc. [negative the words of the covenant].

IV. Whereby the plaintiff has sustained damages in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1284. **Essential Averments.**—In an action of covenant it must appear in the complaint with whom the covenant was made, the performance or readiness to perform, or the excuse for non-performance of a condition precedent, at the place and within the time specified.[4] An action cannot be maintained on a covenant of seisin, unless a breach and an eviction be alleged.[5] And when there has not been an eviction, something equivalent must be averred.[6] It is sufficient to negative the words of the covenant.[7] It is not necessary that a breach

[1] Shelton v. Pease, 10 Mo. 473.
[2] Freeman v. Foster, 55 Me. 508.
[3] Brewer v. Marshall, 4 C. E. Green, 537.
[4] Keatley v. McLaugherty, 4 Mo. 221.
[5] Robinson v. Neil, 3 Ohio, 525; King v. Kerr's Adm'r, 5 Id. 155.
[6] Id.; McGarry v. Hastings, 39 Cal. 360.
[7] 4 Kent's Com. 479; Rickert v. Snyder, 9 Wend. 416.

of a covenant should be assigned in the very words of the covenant. It is sufficient to aver what is substantially a breach.[1]

§ 1285. **Implied Covenants.**—A deed containing the words "grant, bargain, sell, and enfeoff," is operative as a deed of feoffment, and livery of seisin is not necessary.[2] And under the statute of Missouri, it was held that they are separate and independent of each other.[3] In Illinois, the words "grant, bargain, and sell," express covenants that the grantor is seised of an indefeasible estate in fee simple, free from incumbrances done or suffered by the grantor, as also for quiet enjoyment against the grantor, his heirs and assigns.[4] It embraces such incumbrances only as the vendor has control of, and not an outstanding mortgage created by his grantor.[5] In California the civil code provides that "from the use of the word 'grant' in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs to the grantee, his heirs and assigns, are implied, unless restrained by express terms in such conveyance: 1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee; 2. That such estate is at the time of the execution of such conveyance free from incumbrance done, made, or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance."[6] Prior to the code, however, it was held that where there are no covenants of seisin, etc., in the deed, the law will not imply other covenants than those for quiet possession.[7]

§ 1286. **Damages, Measure of.**—When the grantor, in a deed containing a covenant of seisin, has no title to the land, the covenant is broken the instant it is made.[8] Such a covenant is an assurance to the purchaser that the grantor has the estate both in quantity and quality.[9] But where the vendor was actually seised, but of a defeasible estate, the damages should be merely nominal until the estate has been actually defeated.[10] The rule of damages, where there has been an actual loss of the

[1] Fletcher v. Peck, 6 Cranch, 87.
[2] Perry v. Price, 1 Mo. 553.
[3] Alexander v. Schreiber, 10 Mo. 46.
[4] Mosly v. Hunter, 15 Mo. 322.
[5] Armstrong v. Darby, 26 Mo. 517.
[6] Sec. 1113.
[7] Fowler v. Smith, 2 Cal. 39.
[8] Nichols v. Nichols, 5 Hun, 108.
[9] Pecare v. Chouteau, 13 Mo. 527.
[10] Reese v. Smith, 12 Mo. 344; Bircher v. Watkins, 13 Id. 521; Mosely v Hunter, 15 Id. 322; see also Cowdery v. Coit, 44 N. Y. 382.

premises, is the purchase money and interest. Where the plaintiff has purchased the paramount title, it is the sum actually and in good faith paid for the paramount title, and the amount expended in defending his possession; provided such damages shall in no case exceed the purchase money and interest.[1]

§ 1287. **Death of Covenantor.**—Where the covenantor dies before the discovery of the defect of title, and his personal representatives procure a good title, and tender a deed to the covantee, a court of equity will compel him to accept such conveyance, and enjoin a judgment at law for a breach of the covenant.[2]

§ 1288. **Grantee's Covenant to Build.**

Form No. 344.

[TITLE.]

The plaintiff complains, and alleges:

I. That in consideration that the plaintiff would sell and convey to the defendant a lot of land [describe it], for the sum of .....dollars, the defendant, on the .....day of....., 18..., agreed that he would erect upon the premises a good brick house, to be occupied as a dwelling, and that he would not erect upon the premises any building that would be a nuisance to the vicinity of the premises.

II. That the plaintiff did accordingly sell and convey to the defendant said premises for said sum, but the defendant has not erected a good brick house on the lot, to be occupied as a dwelling; but, on the contrary, has erected upon said premises a wooden building, to be used as a slaughter-house.

III. That the defendant thereby has prevented other lots in the vicinity, owned by the plaintiff, from becoming valuable to the plaintiff, as they would otherwise have become, and has injuriously affected their condition, and hindered the plaintiff from selling them; to his damage.....dollars.

[DEMAND OF JUDGMENT.]

§ 1289. **Covenant to Build Party Wall.**—A covenant between A. and B., owners of adjoining premises, that A. may build a party wall, half on each lot, and that when B. uses the same he shall pay half its cost, is personal, and does not pass with the land to A.'s grantee.[3]

§ 1290. **Covenant to Remove Buildings.**—A covenant entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all build-

[1] McGary v. Hastings, 39 Cal 360. [2] Reese v. Smith, 12 Mo. 344.
[3] Block v. Isham, 28 Ind. 37.

ings erected on such lots shall be set back a specified distance from the line of the street on which the lots front, is a convenant which equity will enforce between the parties to it, in favor of one against the other, or in favor of one against any subsequent grantee of either lot.[1] Where the lessee stipulates to surrender the premises at the end of the term, "reasonable use and wear thereof, and damages by the elements, excepted," it does not authorize the tenant to remove buildings erected by him on the lot, even if there be evidence of an oral agreement to that effect.[2]

§ 1291. **Special Damages.**—In an action to recover damages for the breach of a contract, if the damages do not necessarily arise from the breach complained of, so as to be implied by law, the plaintiff must specify in his declaration the particular damage he has sustained, or he will not be permitted to give evidence of it.[3]

§ 1292. **Stipulation to Build.**—Where the lessee stipulated to build a wharf, but specified no particular time, the lessor, before the expiration of the term, could have no legitimate cause of complaint.[4] If the lessee covenants to build on the demised premises within a given time, the covenant is not a continuing covenant, and if he fails to build, the receipt of rent by the lessor accruing after the end of the time given is a waiver of the forfeiture.[5]

§ 1293. **On Covenant against Nuisances—By Grantor against Grantee.**

Form No. 345.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ...., the plaintiff, by his deed, conveyed to the defendant, for a valuable consideration, as well as in consideration of the covenant hereinafter mentioned, a lot of land.

II. That said deed contained a covenant on the part of the defendant, the grantee therein, of which the following is a copy [copy of covenant against nuisances].

III. That said deed was delivered by the plaintiff, and by the defendant duly accepted.

IV. That the defendant has erected, and suffered and permitted to be erected, on said premises, a building occupied and used as a slaughter-house.

V. That the offal and blood in and carried out from said

[1] Roberts v. Levy, 3 Abb. Pr., N. S., 311.
[2] Jungerman v. Bovee, 19 Cal. 355.
[3] Bogert v. Burkhalter, 2 Barb. 525.
[4] Chipman v. Emeric, 5 Cal. 49.
[5] McGlynn v. Moore, 25 Cal. 384.

slaughter-house, and the offensive smell created thereby, is a nuisance to the vicinity of the said premises and to the plaintiff, whose house is adjoining; to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1294. **Alleged Nuisance**.—In such an action it must be shown what the alleged nuisance is, and how it has injured the complainant.[1]

§ 1295. **On a Continuing Covenant to Maintain a Fence.**

Form No. 346.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the .... day of ....., 18..., the plaintiff and defendant then were the owners of lands adjoining, and then made an agreement in writing, under their hands and seals, of which the following is a copy [copy agreement].

II. That the plaintiff has duly performed all the conditions thereof on his part.

III. That the defendant did not, after the erection of said fence, maintain the same and keep it in continual repair, but on the contrary, in the month of ....., 18..., he suffered the same to become dilapidated and broken down, and to remain in that condition from that time until the..... day of ....., 18...

IV. That by means thereof the plaintiff suffered great damage by the injury to his lands and crops thereon, and his garden and fruit trees, by cattle coming through said dilapidated fence from the defendant's land upon the plaintiff's premises, and that plaintiff was compelled to repair and rebuild said fence, in order to protect his land from the damage caused by said cattle; to the damage of the plaintiff ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1296. **Damages on Former Suit.**—Where damages have been recovered in a former action on the same cause, it is proper to allege that fact, and that damages now sued for accrued since the commencement of the former action.[2]

§ 1297. **Lessor against Lessee, on Covenant to Keep Premises in Repair.**

Form No. 347.

[TITLE.]

The plaintiff complains, and alleges:

[1] Bogart v. Burkhalter, 2 Barb. 525.

[2] Beckwith v. Griswold, 29 Barb. 291. As to the right to recover damages for resulting injury and for necessary repairs combined, see Beach v. Crain, 2 Comst. 86.

I. That on the ..... day of .... 18..., by a lease in writing under their hands and seals, the plaintiff leased to the defendant, and the defendant rented from the plaintiff for one year from said date, at a monthly rent of ....., a certain dwelling-house in ....., in the county of ....., the property of the plaintiff.

II. That said lease contained a covenant of the part of the defendant, of which the following is a copy [copy of the covenant].

III. That the defendant entered upon the premises and occupied the same during the said term of one year, under said agreement; but that he has failed to keep the said house and premises in good repair; but, on the contrary [state injuries to premises], and the house and the premises otherwise injured by reason of the neglect of the defendant to keep them in good repair, to the damage of the plaintiff ..... dollars.

[Demand of Judgment.]

§ 1298. **Assigning Breach**—In a declaration upon an agreement, by which the lessor stipulated to let a farm, from January 1, 1820; to remove the former tenants; and that the lessor should have the tenancy and occupation of the farm from that day, free from all hindrance; the assignment of the breach was, that although specially requested on January 1st, the defendant refused and neglected to turn out the former tenant, who was then, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff. Such allegation was held sufficient.[1] To aver plaintiff's readiness and offer, as made on the first day of January, was sufficient. They need not be averred to have been made at the last convenient hour on the day. Nor need they be averred to have been made on the land.[2]

§ 1299. **Copy of Covenant.**—The entire lease need not be set out, only such covenants as relate to the breaches assigned.[3] But where the breach assigned relates to a violation of the obligation arising out of the relation of landlord and tenant, state the hiring, and set out a copy of the lease. The facts out of which the duty or obligation arose ought to be stated.[4]

§ 1300. **Covenants in Leases, Interpretation of.**—A covenant in a lease to be renewed indefinitely is in effect the creation

[1] Carroll v. Peake, 1 Pet. 18.
[2] Id.
[3] Sandford v. Halsey, 2 Den. 235.
[4] City of Buffalo v. Holloway, 7 N. Y. 493; Buffalo, City of, v. Holloway, 14 Barb. 101; Congreve v. Morgan, 4 Duer, 439; Seymour v. Maddox, 16 Q. B. 326; S. C., 71 Eng. Com. L. 326.

of a perpetuity, and is against the policy of law.[1] In California leases of agricultural lands for over ten years, where rent of any kind is reserved, and of city lots for over twenty years, are void.[2] Where a lease contains a covenant against assignment, and the restriction is once removed, it operates as a removal forever.[3] A covenant that if the lessor shall sell or dispose of the demised premises, the lessee is to be entitled to the refusal of the same, is a covenant running with the land.[4] A description in a lease as "a certain lot of land, etc., together with the improvements thereon, consisting of the dwelling known as the Hotel de France," is not an implied guaranty that the hotel shall remain on the lot during the term.[5] A covenant to pay rent quarterly is not a debt until it becomes due; for before that time the lessee may quit with the consent of the lessor, or he may assign his term with his consent, or he may be evicted by a title paramount to that of the lessor.[6] A clause in a lease exempting the tenant from liability to restore house in case of fire, does not relieve from rent in case of such destruction.[7]

§ 1301. **Damages by the Elements.**—Those acts are to be regarded as the acts of God which do not happen through human agency, such as storms, lightnings and tempests.[8] Damages "by the elements" are damages by the act of God.[9]

§ 1302. **Exceptions in Covenant to Repair.**—In an action on a covenant in a lease to repair, followed by an exception in a distinct clause, the complaint need not notice the exception.[10]

§ 1303. **Forfeiture.**—If the landlord, after default, accepts the rent, he thereby waives the forfeiture, and can not afterwards insist upon it, and much less can the tenant be allowed to say that he is discharged from his covenants by his own default in the payment of rent.[11] In relation to leases for years, as well as those for life, the happening of the cause of forfeiture only renders the lease void as to the lessee. It may be affirmed as to the lessor, and then the rights and obligations of both parties continue without regard to the forfeiture.[12] The tenant can not insist that his own act amounted to a forfeiture. If he could, the consequence would be, that in every instance of an action on the covenant for rent, brought on a covenant with a

[1] Morrison v. Rossignol, 5 Cal. 65.
[2] Civil Code, secs. 717, 718.
[3] Chipman v. Emeric, 5 Cal. 49.
[4] Laffan v. Naglee, 9 Cal. 662.
[5] Branger v. Manciet, 30 Cal. 624.
[6] Wood v. Partridge, 11 Mass. 488; cited in People v. Arguello, 37 Cal. 524.
[7] Beach v. Farish, 4 Cal. 339.
[8] Polack v. Pioche, 35 Cal. 416.
[9] Id.
[10] Trustees of New Castle Common v. Stevenson, 1 Houst. (Del.) 451.
[11] Belloc v. Davis, 38 Cal. 250.
[12] Clarke v. Jones, 1 Den. 519; Rede v. Farr, 6 M. & S. 121; Belloc v. Davis, *supra*.

proviso of forfeiture of non-performance, the landlord would be defeated by the tenant showing his own default at a prior period.[1]

§ 1304. **Lease as Evidence.**—In California, leases for more than one year must be in writing, but for a less term a verbal lease is sufficient.[2] In New York, the plaintiff may introduce in evidence a lease not under seal, to prove that the relation of landlord and tenant existed, and what was the rent agreed upon.[3]

§ 1305. **Under-lease.**—One who takes an under-lease is bound by all the covenants in the original lease.[4] So the sale of spirits in bottles by a grocer, is a breach of a covenant that premises shall not be used "as an inn, public house, or tap-room, or for the sale of spirituous liquors."[5] An under-lease of a whole term amounts to an assignment.[6]

§ 1306. **Void Lease.**—A lease for two years, executed by the lessees and by an agent of the lessors, but who had no written authority to do so is void.[7] Where a clause of renewal in a lease discloses no certain basis for ascertaining the rent to be paid, such clause is void for uncertainty.[8] So a covenant "to let the lessor have what land he and his brothers might want for cultivation," is void for uncertainty.[9]

§ 1307. **Lessee against Lessor, for not Keeping Premises in Repair.**

Form No. 348.

[TITLE]

The plaintiff complains, and alleges:

I. That on the ..... day of....., 18.., by a lease made between the plaintiff and the defendant, under their hands and seals, the defendant leased to the plaintiff, and the plaintiff rented from the defendant, the premises known as No. ....., ... street, in ....., for ..... months from that date, at the monthly rent of ..... dollars.

II. That said lease contained a covenant on the part of defendant, of which the following is a copy: [Copy of covenant to keep in repair.]

[1] Doe dem. Bryan v. Banks, 4 Barn. & Ald 409: cited in Belloc v. Davis, *supra*, referring also to Stuyvesant v. Davis, 9 Paige, 427; Canfield v. Westcott, 5 Cow. 270; and the distinction drawn between these cases and the case of Hemp v. Garland, 4 Q. B. 519; 3 Gale & Davidson, 402; 45 Eng. Com. L. 519; see, also, vol. 2, "Landlord and Tenant."

[2] Civil Code, sec. 1624.

[3] Williams v. Sherman, 7 Wend. 109.

[4] Feilden v. Slater, L. R., 7 Eq. 523.

[5] Id.

[6] Beardman v. Wilson, L. R., 4 C. P. 57.

[7] Folsom v. Perrin, 2 Cal. 603.

[8] Morrison v. Rossignol, 5 Cal. 65.

[9] Chipman v. Emeric, 5 Cal. 49.

III. That the plaintiff entered into possession of said premises under said lease, and used the same as a warehouse for storing various articles of merchandise.

IV. That the defendant has failed to keep the premises in repair, and has allowed [state neglect and special damage caused thereby], to the damage of the plaintiff ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1308. **General Covenant to Repair.**—If the embankment of a natural reservoir, which is filled with water by unusual rain, is broken by a stranger, so that the demised premises are injured by the water, the injury is not the act of God or of the elements, and the tenant is bound to repair, even if damages by the elements or acts of Providence are excepted from his covenant.[1] A general covenant to repair is binding upon the tenant under all circumstances, even if the injury is from the act of God or a stranger.[2]

§ 1309. **Implied Obligation.**—Defendant entered upon, occupied, and paid rent for premises under a demise for a term of years, made on behalf of a corporation, the owners, but not sealed with the corporate seal. By this agreement defendant undertook to make certain repairs; it was held that he was bound by his stipulation. He had become tenant from year to year, on the terms of the demise applicable to such tenancy.[3]

§ 1310. **Joint Lessors.**—Where a lease was made by several owners of a house, reserving rent to each one in proportion to his interest, and there was a covenant on the part of the lessee that he would keep the premises in good repair, and surrender them in like repair, this covenant was joint as respects the lessors, and one of them (or two representing one interest) can not maintain an action for the breach of it by the lessees.[4]

§ 1311. **Lessee against Lessor, for not Completing Building according to Agreement.**

Form No. 349.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiffs, under the firm name of A. B. & Co., and the defendants, under the firm name of C. D. & Co., entered into an agreement in writing, of which agreement the following is a copy [copy agreement to complete unfinished store, similar to adjoining store].

[1] Polack v. Pioche, 35 Cal. 416.
[2] Id.
[3] Ecclesiastical Commissioners v. Merral, L. R., 4 Exch. 162.
[4] Calvert v. Bradley, 16 How. (U. S.) 580.

II. That after the making of said agreement, and on the ..... day of ....., 18...., the defendants delivered, and the plaintiffs took possession of said building, under and in pursuance of said agreement, and upon the faith and assurance of the defendants, and the full belief thereof that the said premises were finished in the same manner as the adjoining store, and in accordance with the terms of said agreement.

III. That the said premises were not finished in the same manner as the store adjoining at the time of making such agreement, but, on the contrary [allege specifically the difference].

IV. [Allege special damages], to the damage of the plaintiff ..... dollars.

[Demand of Judgment.]

§ 1312. **For Breach of Covenant of Quiet Enjoyment Against Landlord.**

Form No. 350.

[Title.]

The plaintiff complains, and alleges:

I. That on the..... day of....., 18...., at ....., the defendant, by deed [or lease under seal], let to the plaintiff, and the plaintiff rented from the defendant, the house numbered ....., ...street, ..., for the term of three years, covenanting that the plaintiff should quietly enjoy possession thereof for the said term.

II. That on, etc., one A. B., who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

III. That the plaintiff was thereby prevented from continuing the business of [merchandising] at the said place, and was compelled to expend ..... dollars in moving, and lost the custom of C. D., E. F., and G. H., and divers other persons, by such removal.

[Demand of Judgment.]

§ 1313. **Covenant Defined.**—The breach of the covenant for quiet enjoyment is an actual disturbance of possession by reason of some adverse right existing at the time of the making the covenant;[1] not a tortious disturbance, nor a lawful disturbance by an adverse right subsequently acquired.[2] Where a lease contains an express covenant for quiet enjoyment "without molestation or disturbance of or from the lessor, his successor or assigns," no other or further covenant in respect

[1] 2 Greenl. on Ev. 239.

[2] Greenby v. Wilcox, 2 Johns. 1; Graunis v. Clark, 8 Cow. 36. As to an entry by the landlord, see Sedgwick v. Hollenback, 7 Johns. 376.

to enjoyment will be implied.[1] Under the civil code of California a covenant for quiet enjoyment against all persons lawfully claiming the same, is implied in all letting for hire.[2]

§ 1314. **Eviction.**—Without an eviction there is no breach of the covenant for quiet enjoyment; but it is not necessary that the eviction should be by process of law, consequent on a judgment.[3] The covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title.[4]

§ 1315. **Necessary Averments.**—The complaint must state the particulars as to the person or persons who prevented him and by what right, and show a title at or before the date of the lease declared on.[5]

§ 1316. **Responsibility of Landlords.**—Upon a covenant in a lease for quiet enjoyment, the lessor is responsible only for his own acts and those of others claiming by title paramount to the lease.[6] In such a covenant no set formula is required. Any language which expresses the intent is sufficient.[7]

CHAPTER IV.

EMPLOYMENT.

§ 1317. **For Breach of Contract to Employ.**

Form No. 351.

[TITLE.]

The plaintiff complains, and alleges:

III. That on the ..... day of ....., 18 ...., at ....., the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant], and that the defendant should employ the plaintiff as such for the term of [one year, or as the case may be], and pay him for his services ..... dollars monthly [or as the case may be].

II. That on the ..... day of ....., 18..., the plaintiff entered upon the service of the defendant under said agreement, and has ever since been, and still is, ready and willing to continue in such service.

III. That on the ..... day of ..... 18 .., the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, though the plaintiff then and there

[1] Burr v. Stenton, 43 N. Y. 462.
[2] Sec. 1927.
[3] McGary v. Hastings, 39 Cal. 360.
[4] Id.
[5] Grannis v. Clark, 8 Cow. 36.
[6] Playter v. Cunningham, 21 Cal. 229.
[7] Levitzky v. Canning, 33 Cal. 299.

offered to continue in said service, and perform said agreement on his part, to the damage of the plaintiff ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1318. **Discharge of Employee.**—Where no definite period of employment is agreed upon between master and servant, the master has a right to discharge the servant at any time, and to eject him by force if he refuses to leave after receiving notice to that effect, but no more force than is necessary [1] But where a contract for services is made for a fixed period, if the employer discharge the servant without good cause, the servant may recover the stipulated wages.[2]

§ 1319. **Entire Contract.**—A distinction exists between contracts for specific work and contracts for the hire of clerks, agents, laborers, domestic servants, etc., for a specified period. In the latter, if the person employed is improperly dismissed before the term of service has expired, he is entitled to recover for the whole term, unless the defendant can show, by way of defense, that the plaintiff was actually engaged in other profitable service during the term, or that such employment was offered to him and rejected.[3] A contract to grade a section of a railroad is an entire contract, and a condition in it for payments from time to time, as the work progresses, does not make it severable.[4] If the contractor, in such case, is prevented by his employer from completing his whole contract, he is justified in abandoning it, and may recover a fair compensation for the work performed.[5]

§ 1320. **Measure of Damages.**—The increase of damages is not the entire contract price, but a just recompense for the actual injury which the party has sustained.[6]

§ 1321. **Offer to Perform.**—The rejection of the offer to perform services excuses the performance as a condition precedent, but does not release the plaintiff from the obligation to perform so long as he insists upon the agreement.[7] When the plaintiff has been wrongfully discharged, this averment, coupled with an allegation of readiness to serve, is all that is necessary. He need not aver an offer to serve.[8] For if any one is bound to do a thing, he must either do it or offer to do it, and if no objections are made, he must show that he made a tender in a

[1] De Briar v. Minturn, 1 Cal. 450.
[2] Webster v. Wade, 19 Cal. 291.
[3] Costigan v. Mohawk & Hudson River R. R. Co., 2 Den. 609; 2 Greenl. Ev. 278; sec. 261 a.
[4] Cox v. W. P. R. R. Co., 47 Cal. 87.
[5] Cox v. Western Pacific R. R. Co., 47 Cal. 87.
[6] Clark v. Marsiglia, 1 Den. 317.
[7] Cooper v. Pena, 21 Cal 403
[8] Wallis v. Warren, 4 Exch. 364; 7 Dowl. & L. 60.

regular manner; but this is not necessary if the other party by his conduct dispenses with a tender, as by a previous refusal to accept.[1]

§ 1322. **Rescission of Contract.**—If the servant willfully desert the employer's service, the employer is not bound to receive him again, and he can not recover for past services.[2] Plaintiff agreed to work seven months for defendant, at ten dollars per month, unless one or the other should become dissatisfied. He worked six months and a half, and left, alleging that he had business to attend to: Held, that he could not recover.[3]

§ 1323. **The Same—Where the Employment Never took Effect.**

Form No. 352.

[TITLE.]

The plaintiff complains, and alleges:

I. [As in last form.]

II. That on the ..... day of ....., 18 .., at ....., the plaintiff offered to enter upon the service of the defendant, and has ever since been ready and willing so to do.

III. That the defendant refused to permit the plaintiff to enter upon such services, or to pay him for his services, to the damage of the plaintiff..... dollars.

[DEMAND OF JUDGMENT.]

§ 1324. **For Breach of Contract to Serve.**

Form No. 353.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18...., at ...., the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at [a monthly] compensation of .... dollars, and that the defendant should serve the plaintiff [as bookkeeper] for the term of [one year].

II. That the plaintiff has always been ready and willing to perform his part of the said agreement [and on the ..... day of....., 18..., offered so to do].

III. That the defendant refused to serve the plaintiff as aforesaid, to his damage.....dollars.

[DEMAND OF JUDGMENT.]

§ 1325. **Age of Apprentice.**—The master of an apprentice is concluded by the recital in the indentures of the age of the boy.[4] And a stranger to the indentures can not take advantage

[1] Blight v. Ashley, Pet. C. Ct. 15.
[2] Paxon v. Mansfield, 2 Mass. 147; Lantry v. Parks, 8 Cow. 63.
[3] Monell v. Burns, 4 Den. 121.
[4] McCutchin v. Jamieson, 1 Cranch C. Ct. 348.

of the omission to insert the age of the apprentice in the indentures.[1]

§ 1326. **Assignment of Indentures.**—A master can not assign the indentures of an apprentice.[2] And therefore a note given for such an assignment, being based upon a void contract, can not be recovered.[3]

§ 1327. **Apprentice's Wages.**—The master is entitled to his apprentice's wages when hired by another, whether the person hiring knew or not that he was an apprentice.[4] The right of the master to the earnings of the apprentice, in the way of his business, or of any other business which is substituted for it, does not extend to his extraordinary earnings, which do not interfere with the profit which the master may legitimately derive from his services.[5]

§ 1328. **By the Master, against the Father of Apprentice.**

[*Form No. 354.*]

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., one A. B., with the consent of the defendant, made an indenture under his hand and seal, a copy of which is hereto annexed.

II. That at the same time and place, the defendant entered into an agreement, under his hand and seal, a copy of which is also hereto annexed [or state the tenor of these covenants].

III. That on the ..... day of ....., 18..., the said A. B. willfully absented himself from the service of the plaintiff, and continues so to do, to his damage .... dollars.

[DEMAND OF JUDGMENT.]

[Annex copy of indenture.]

§ 1329. **Breach, how Alleged.**—The allegation that the defendant had not used any endeavors to have the apprentice serve, and refused to do anything, sufficiently showed a breach.[6]

§ 1330. **Covenants.**—The usual covenants in an apprentice's indenture are independent, and the plaintiff need not aver performance on his part.[7]

§ 1331. **Liability of Parent.**—That the father of an apprentice may be held liable upon the indenture, by reason of his signature and seal, although there are no express words

[1] Heinecke v. Rawlings, 4 Cranch C. Ct. 699.

[2] Handy v. Brown, 1 Cranch C. Ct. 610.

[3] Walker v. Johnson, 2 Cranch C. Ct. 20[illegible].

[4] James v. Le Roy, 6 Johns. 274; Munsey v. Goodwin, 3 N. H. 272; Conant v. Raymond, 2 Aik. 248.

[5] Mason v. The "Blaireau," 2 Cranch, 240.

[6] Van Dorn v. Young, 13 Barb. 286.

[7] Phillips v. Clift, 4 Hurl. & Nor. 167.

of covenant binding him.[1] If a son remains with and performs services for his father after attaining his majority, the law will not, ordinarily, imply a promise on the part of the father to pay for his labor; but if the circumstances show that the expectation of both parties was that he should be compensated, the promise will be implied, and he may recover a *quantum meruit*.[2]

§ 1332. **By the Apprentice, against the Master.**

Form No. 355.

[TITLE]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at....., the defendant entered into an agreement with the plaintiff, and his father Benjamin Rider, under his and their hands and seals, a copy of which is hereto annexed.

II. That the defendant has not [instructed the plaintiff in the business of....., or state any other breach], to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1333. **Right of Action.**—An apprentice may sue a master for not teaching him his trade, although no indentures were executed, the master having taken him under an order of the court.[3]

§ 1334. **For Breach of Contract to Manufacture Goods.**

Form No. 356.

[TITLE]

The plaintiff complains, and alleges:

I. That on the.....day of ....., 18..., at ....., the defendant promised and agreed with the plaintiff to manufacture and deliver to the plaintiff 400 dozen woolen hose, at the price of ..... dollars for each dozen, for which the plaintiff agreed to pay the defendant.....dollars.

II. That the plaintiff duly performed all the conditions of said agreement on his part.

III. The defendant did manufacture said hose under said agreement, but manufactured them in an unskillful and unworkmanlike manner, to the damage of the plaintiff..... dollars.

[DEMAND OF JUDGMENT.]

§ 1335. **For Refusing to Accept Manufactured Goods.**

Form No. 357.

[TITLE.]

I. That on the.....day of ..... 18..., at ....., the

[1] Woodrow v. Coleman, 1 Cranch C. Ct. 171.

[2] Friermuth v. Friermuth, 46 Cal. 42.

[3] Adams v. Miller, 1 Cranch C. Ct. 5.

defendant contracted with the plaintiff to make for him [describe what], and agreed to pay for the same, upon delivery thereof, ... dollars.

II. That the plaintiff made the said goods, and on the ... . day of ....., 18..., offered to deliver the same to the defendant, and has ever since been ready and willing to deliver them, and has otherwise duly performed all the conditions of said contract on his part.

III. That the defendant has not accepted or paid for the same.

[Demand of Judgment.]

[Copy of Contract.]

§ 1336. On a Promise to Manufacture Raw Material into Merchantable Goods.

Form No. 358.

[Title.]

The plaintiff complains, and alleges:

I. That on the ... . day of ....., 18..., at ....., the plaintiff delivered to the defendant ..... [sides of leather], of the value of ..... dollars, to be manufactured into [harness], for a reasonable compensation, to be paid to the defendant by the plaintiff.

II. That the defendant, in consideration thereof, undertook to manufacture the said [harness], or cause it to be manufactured from the [leather], and to deliver the same to the plaintiff when so manufactured.

III. That the said [leather] was so manufactured into [harness] by the defendant before the ..... day of ....., 18..., on which day the plaintiff demanded the same of the defendant, and then and there offered to pay him a reasonable compensation for manufacturing the same.

[Or, III. That the defendant did not manufacture said (leather) into (harness), although a reasonable time therefor elapsed before this action.]

IV. That the defendant, then and ever since, refused and neglected to deliver the same, and has converted them to his own use.

[Or, IV. That the defendant manufactured said (leather) in such a negligent and unskillful manner, that the said (harness) was of no value.]

[Demand of Judgment.]

CHAPTER V.

INDEMNITY.

§ 1337. By Retiring Partner, on the Remaining Partner's Promise to Indemnify Him against Damage.

Form No. 559.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff and defendant, being partners in trade under the firm name of A. & B., dissolved the said partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm, and indemnify the plaintiff against all claims that might be made upon him, on account of any indebtedness of the said firm.

II. That the plaintiff duly performed all the conditions of the said agreement on his part.

III. That on the ..... day of ....., 18...., a judgment was recovered against the plaintiff and defendant by one John Doe, in the ..... court of this state, upon a debt due from the said firm to the said Doe, and on the ..... day of ....., 18..., the plaintiff paid ..... dollars in satisfaction of the same.

IV. That the defendant has not paid the same to the plaintiff, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1338. **Definition.**—Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.[1]

§ 1339. **Essential Averments—Damage—Demand.**—In actions upon an ordinary contract to indemnify against loss or damage, the plaintiff must aver actual damage; and if he has paid under a judgment this should be stated, with the date of the judgment, the court in which it was rendered, and the amount of the judgment; while on an agreement to save from liability, actual damage need not be averred;[2] but consequential damages must be specially alleged.[3] Thus in an action on a bond of indemnity, the plaintiff must set out wherein he has been damnified. A general averment of loss is insufficient.[4] But

[1] Cal. Civil Code, sec. 2772.
[2] McGee v. Roen, 4 Abb. Pr. 8.
[3] Swan's Pl. 381. For allegations in such actions, see Allare v. Ouland, 2 Johns. Cas. 52; Holmes v. Weed, 19 Barb. 128.
[4] Coe v. Rankin, 5 McLean, 354.

where defendant agreed to indemnify the plaintiff against loss on a sale of stock, on demand, an action for the deficiency may be maintained at any time after the sale, without a previous demand.[1] So, also, in an action on a bond to indemnify the plaintiff against damages he might sustain by the levy of an attachment, the plaintiff alleged the recovery of a judgment against plaintiff for damages against which he was indemnified, and the payment of said judgment. The averment of payment was material to plaintiff's right to recover for the amount of such judgment.[2] The averment that the plaintiff necessarily incurred expenses, is equivalent to the allegation that he incurred necessary expenses.[3] And the complaint must show how and in what manner these necessary expenses were incurred, naming the court in the allegation.[4] But the failure to make such an averment is not fatal; it is at most but an irregularity.[5]

§ 1340. **Attachment—Release from.**—Recovery may be had on a bond given to a sheriff, to release property from attachment, to the extent of the penalty.[6] Such bond is not a statutory undertaking, and is valid at common law. Execution against the judgment debtor is not a condition precedent to suit on the bond, and any mistake in the recital as to the amount for which attachment issued may be explained and corrected by parol.[7] It takes effect at the time of its delivery.[8] Such a bond is for the benefit of the plaintiff who may sue upon it, and if the sheriff takes a sufficient statutory undertaking, he has no further responsibility.[9] The bond given to release property attached, only releases it from the custody of the sheriff, and is not an actual substitution of security, compelling the plaintiff to proceed upon the bond alone to collect his payment.[10] An indemnity bond to the sheriff to retain property seized under attachment, is an instrument necessary to carry the power to sue into effect.[11]

§ 1341. **Administrator's Bond.**—Where an administrator makes premature payment of a claim, and takes a bond of indemnity, such a bond would be held legal and binding.[12]

§ 1342. **Execution. Seisure under.**—An agreement to indemnify a sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right.[13]

[1] Halleck v. Moss, 22 Cal. 266.
[2] Roussin v. Stewart, 33 Cal. 203.
[3] Glover v. Tuck, 1 Hill, 66.
[4] Patton v. Foote, 1 Wend. 207.
[5] Packard v. Hill, 7 Cow. 434
[6] Palmer v. Vance, 18 Cal. 553.
[7] Palmer v. Vance, 18 Cal. 553.
[8] Buffendeau v. Brooks, 28 Cal. 641.
[9] Curiac v. Packard, 29 Cal. 194.
[10] Low v. Adams, 6 Cal. 277.
[11] Davidson v. Dallas, 8 Cal. 227.
[12] Comstock v. Breed, 12 Cal. 289.
[13] Stark v. Raney, 18 Cal. 622

§ 1343. **Conditions Precedent.**—If the obligors undertake to indemnify the sheriff for any damage by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the sheriff can not maintain an action on the bond because judgment has been rendered against him, but must first pay the judgment.[1] If the sheriff is indemnified for the act alone, and suit is brought against him and judgment recovered, the sheriff can not afterwards have judgment on the indemnity bond against the sureties upon five days' notice unless he gave the sureties written notice of the action brought against him.[2]

§ 1344. **Interpretation.**—In the interpretation of a contract of indemnity the following rules are to be applied, unless a contrary intention appears: 1. Upon an indemnity against liability expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable; 2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof; 3. An indemnity against claims or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion; 4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defense if he chooses to do so; 5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by him in good faith, is conclusive in his favor against the former; 6. If the person indemnifying, whether he is a principal or surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former; 7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defense upon the merits, which by want of ordinary care he failed to establish in the action.[3] An indemnity against the acts of a certain person applies also to those of his agent.[4]

[1] Lott v. Mitchell, 32 Cal. 23.

[2] Dennis v. Packard, 28 Cal. 101; see Code C. P., sec. 1055.

[3] California Civil Code, sec. 2778.

[4] California Civil Code, sec. 2775. See also, as to contracts of indemnity and rules in reference thereto, Theobald's Principal and Surety;

§ 1345. **Injunction.**—A bond of indemnity, executed in pursuance of articles of agreement, may in equity be restrained so as to conform to those articles. But a departure from the articles must be clearly shown.[1] Thus, under an agreement to indemnify a retiring partner against demand upon the concern, and a bond of indemnity reciting that it was agreed to indemnify against debts, including those due from others which had been assumed, it was held, that the bond might be enforced.[2]

§ 1346. **Joint and Several Liability.**—One who indemnifies another against an act to be done by the latter, is liable jointly with the person indemnified, and separately to every person injured by such act.[3]

§ 1347. **Liability of Sureties.**—Where the sheriff, under a writ of attachment, is about to levy upon the property of a firm, and a bond is executed by third parties as sureties, conditioned to keep harmless and indemnify the sheriff against all damages and expense he may be put to by reason of the non-seizure of the property, and "to pay whatever judgment may be rendered against said defendants;" and judgment was obtained against one only of the defendants—plaintiffs failing on the trial to prove the other to be a partner—the sureties are liable on the bond for the amount of the judgment; that the bond, though not strictly an undertaking under the statute, conforms substantially to its requirements, and must be read by the light of the statute, and interpreted according to the intention of the parties.[4] Such bond will be presumed to have been executed with reference to the provisions of the statute; and will be held such a security, and the fact that judgment was obtained against one only of the defendants, satisfies the condition to "pay whatever judgment may be rendered against said defendants."[5]

§ 1348. **Liability, Discharge from.**—Whenever the liability of the sureties is fixed by the rendition of a judgment in favor of the plaintiff, the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same, the sureties are discharged from their obligation on the undertaking.[6] Such tender is equivalent to payment or release by said plaintiff. The sureties are likewise discharged where the principal tenders to the plaintiff the full amount of

Chitty, Jr., Cont., 5th Am. ed., 56; Stone v. Hooker, 9 Cow. 154; Whitaker v. Smith, 4 Pick. 83; Chace, Adm'r etc., v. Hinman, 8 Wend. 452.

[1] Finley v. Lynn, 6 Cranch, 238.

[2] Finley v. Lynn, 6 Cranch, 238.

[3] Cal. Civil Code, sec. 2777.

[4] Heynemann v. Eder, 17 Cal. 433.

[5] Id.

[6] Hayes v. Josephi, 26 Cal. 535.

his debt and costs, and the plaintiff refuses to receive the tender.[1]

§ 1349. **Notice to Sureties.**—If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on his bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the court or judge in vacation may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.[2] The provision of the practice act is founded upon the principle that the action, under such circumstances, is in substance against the indemnifier, the real party in interest, and that he has in that action an opportunity to make any defense that may exist.[3] Where, therefore, the indemnifier has been so notified, he can not maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it, had he been the nominal as well as real party defendant to the first action.[4]

§ 1350. **Remedy.**—When an indemnity bond is given to a sheriff to hold him harmless, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not.[5]

§ 1351. **Sale under Execution.**—A bond given to a sheriff to indemnify him for any loss or damage he may sustain by selling property levied on by him, by virtue of an execution, in violation of an order enjoining its sale, is void, because an unlawful contract.[6]

§ 1352. **Trespass.**—An agreement to indemnify a party for a willful trespass about to be committed, is void, as against public policy.[7]

§ 1353. **Void Contract.**—An agreement to indemnify a person against an act thereafter to be done, is void, if the act be known by such person, at the time of doing it, to be unlawful.[8] But an agreement to indemnify against an act already done, is valid, even though the act was known to be wrongful, unless it was a felony.[9]

[1] Curiac v. Packard, 29 Cal. 194.
[2] California Code Civ. Proc., sec. 1055.
[3] Dutil v. Pacheco, 21 Cal. 438.
[4] Id.
[5] White v. Fratt, 18 Cal. 521.
[6] Buffendeau v. Brooks, 28 Cal. 641.
[7] Stark v. Raney, 18 Cal. 622.
[8] Civil Code, sec. 2773.
[9] Id., sec. 2774.

§ 1354. Against Sureties in Partner's Bond of Indemnity against Liability.

Form No. 360.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of ....., 18.., the plaintiff and one A. B. were copartners in business as merchants, in the city of....., under the firm name of A. B. & Co., and thereafter on the same day they dissolved their connection as such copartners, and thereupon entered into an agreement in writing, of said date, duly executed and signed by them respectively, whereby it was, among other things, mutually agreed that the said A. B. should retain and keep to his sole and separate use all and singular the partnership property of every name and character, whether in action or possession, and wheresoever situated; and in consideration thereof, that he should pay and discharge the debts so due by the said firm, to the extent of .....dollars, from his own individual resources, and to the like extent hold the plaintiff harmless and indemnified, of and from and by reason of any and all claims or liabilities due by said firm, a copy of which agreement is hereto annexed as a part of this compaint, marked "Exhibit A."

II. That the defendants, in consideration of said agreement between said A. B. and the plaintiff, and of one dollar to each of them then paid by the plaintiff, entered into an agreement executed and signed by them respectively, a copy whereof is annexed hereto as a part of this complaint, and marked "Exhibit B," whereby they severally undertook and bound themselves to the plaintiff, for the faithful performance by the said A. B. of the covenants in said agreement, to be kept and performed on said A. B.'s part.

III. That said A. B., under his said agreement with the plaintiff, retained and kept to his sole and separate use all the partnership property of the firm; but has not, pursuant thereto, paid and discharged the debts due by said firm to the extent aforesaid; and has failed to hold this plaintiff harmless and indemnified to the like extent, of and from and by reason of any claims or liabilities due by the said firm.

IV. That at the time of the dissolution of the partnership, and of the making of the agreement aforesaid, the said firm was indebted to firm of R. & Co., of ....., for merchandise sold and delivered, in the sum of ..... dollars, which was then due and payable; which indebtedness formed a part of the .... dollars, debts of A. B. & Co., and was included

among such debts, to be paid by the said A. B., under his agreement aforesaid with the plaintiff; but the said A. B., although requested, would not pay R & Co. their said demand or any part thereof.

V. That on the ..... day of ..... last, an action was commenced by the plaintiff in the [state the court], to recover upon and by virtue of the aforesaid agreement, from the said A. B., the said amount, with interest, then due by the said A. B. & Co. to the said firm of R. & Co., amounting to ..... dollars, and interest thereon; and such proceedings were thereupon had that on the ..... day of ....., 18...., judgment was rendered in such action in favor of the plaintiff against the said A. B. for the sum of ..... dollars, including costs; upon which judgment execution was at once issued against the said A. B. and returned wholly unsatisfied.

VI. That the plaintiff has paid ..... dollars, the amount of said judgment, and other necessary costs, disbursements, and attorney's fees therein, amounting to ..... dollars.

VII. That he has demanded from the defendants payment of the said amounts, but they have not paid the same.

[DEMAND OF JUDGMENT.]

[Annex copies of agreements, marked Exhibits "A" and "B."]

§ 1355. **Notice of Debt.**—That the defendants had notice of the debt need not be alleged, as it is matter which lies properly in the knowledge of the defendant, especially if it is averred that the books and papers of the firm were transferred to the defendants.[1]

§ 1356. **Partnership Indemnity.**—Where a partner, in retiring, covenants to indemnify his successors against all liabilities connected with the business in which the parties had before been engaged, the covenant did not apply to the liabilities incurred by the plaintiff while he carried on the business on his own account.[2]

§ 1357. **Surety against Principal, for Indemnity against Liability as Surety.**

Form No. 361

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at....., in consideration that the plaintiff would become surety for him, by executing an undertaking, of which a copy is annexed as a part of this complaint, marked "Exhibit A," agreed with the plaintiff that he would indemnify him, and save him harmless

[1] Clough v. Hoffman, 5 Wend. 499. [2] Haskell v. Moore, 29 Cal. 487.

from and against all damages, costs, and charges which he might sustain by reason of his becoming surety as aforesaid.

II. That the plaintiff, confiding in such promise of the defendant, executed and delivered such undertaking.

III. That the defendant did not indemnify the plaintiff, and save him harmless from such damages, costs and charges; but, on the contrary, the plaintiff, under a judgment, on the ..... day of ..... 18..., rendered against him by the ..... court, at ....., in an action brought against him upon said undertaking, paid, on the ..... day of ....., ... dollars to ....., in satisfaction and discharge of said undertaking, and also necessary costs and expenses in said action and on account of said undertaking, to the amount of ..... dollars.

IV. That notice thereof was given to the defendant, and that the plaintiff duly performed all the conditions of the said agreement on his part.

V. That the defendant has not paid the same to the plaintiff.

[DEMAND OF JUDGMENT.]

[Annex copy of undertaking, marked "Exhibit A."]

§ 1358. **Right of Surety.**—Where Jones, for the accommodation of Smith, indorses a note to Stiles, and Smith delivers an article of property to Jones to indemnify him against his liability on the indorsement, Stiles can in equity avail himself of the security for the satisfaction of the note. Jones merely seeks to indemnify himself; he is not to make profit out of the indorsement. He is personally liable to pay the whole debt, whether he receives anything from the principal or not, and it is his duty to pay it; and as Jones holds property in his hands, belonging to his principal, expressly for his indemnity, if it is applied to the payment of the debt, both the duty of himself and his principal is discharged, and the indemnity at the same time satisfied.

§ 1359. **When Indemnitor a Surety.**—Where one, at the request of another, engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety, for whatever he may pay.

[1] Van Orden v. Durham, 35 Cal. 145. As to the right to recover costs paid and incurred by the surety, see Chit. Jr., Cont., 5th Am. ed., 504; Davenport v. Ferris, 6 Johns. 131; Bell v. Morrison, 1 Pet. 350; Hamilton v. Schofield, 17 Eng. Com. L. 457; Jones v. Brooke, 4 Taunt. 464; Stracy v. Bank of England, 19 Eng. Com. L. 338; Hubbuy v. Brown, 16 Johns. 70; Fulton Bank v. Stafford, 2 Wend. 484; Everingham v. Langton, 2 McCord, 159.

[2] Cal. Civil Code, sec. 2779.

§ 1360. **Sub-tenant against his Immediate Lessor.**

Form No. 362.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant held certain premises [describe them], as tenant thereof to one A. B., at a monthly rent of ..... dollars, payable by the defendant to said A. B. on the [state time of payment].

II. That on the ..... day of ....., 18.., in consideration that the plaintiff then became the tenant to the defendant of said premises, at a monthly rent of ..... dollars, payable to him by the plaintiff, the defendant gave to the plaintiff an agreement to indemnify him, of which the following is a copy [copy agreement].

III. That the defendant, contrary to his agreement, failed to pay the rent for the month of ....., which was during the tenancy of the plaintiff under said agreement.

IV. That by reason thereof, said A. B., on the ..... day of ....., 18..., in the ..... court, commenced proceedings to recover possession of said premises, which were then occupied by the plaintiff under said agreement, for the non-payment of said rent; and thereby the plaintiff, on the ..... day of ....., 18.., at ..... ., was compelled to pay to said A. B., to the use of the defendant, the sum of ..... dollars, the amount of said rent, together with ..... dollars, the costs, disbursements, and attorney's fees therein.

V. That he has demanded from the defendant payment of the said amounts, but he has not paid the same.

[DEMAND OF JUDGMENT.]

§ 1361. **Consequential Damages.**—To recover consequential damages or costs, the averment must be special.

§ 1362. **Eviction by Wrong-doer.**—If a tenant is evicted by a wrong-doer, the landlord is not bound to indemnify him.[1]

§ 1363. **On Agreement of Indemnity to Plaintiff for Defending Action for Surrender of Property.**

Form No. 363.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the ..... day of ....., 18.., one A. B. deposited with the plaintiff ..... dollars.

II. That afterwards, on the ..... day of ....., 18.., the plaintiff, at the request of the defendant, delivered to him the said sum of money so deposited by A. B., which money the de-

[1] Schilling v. Holmes, 23 Cal. 227.

fendant claimed; and that the plaintiff did not know to whom the same belonged.

III. That afterwards, on the said ..... day of ....., 18..., the plaintiff, at the request of the defendant, agreed with the defendant that he would defend any action which the said A. B. should commence against him for the said money; and the defendant, in consideration of the premises, then promised the plaintiff to indemnify and save him harmless from the consequences of such an action.

IV. That the said A. B., on the ..... day of ....., 18...., commenced an action against the plaintiff in the [state the court], for the recovery of the said sum of money, of which the defendant then had notice.

V. That the plaintiff, with the privity of the defendant, and to the best of his ability, defended the said action; but the said A. B., on the ..... day of ....., 18..., at a general term of said court, recovered a judgment against the plaintiff in said action, to the amount of ..... dollars; and, afterwards, an execution was issued upon the said judgment, against the property of the plaintiff, who, on the ..... day of ....., 18..., paid the said sum of ..... dollars, and also the sum of ..... dollars, for officers' fees, and other expenses upon the said writ. And the plaintiff was also by means of the premises, compelled to pay other charges and expenses, for costs and disbursements and counsel fees, amounting to the sum of ..... dollars, in defending the said action.

VI. That the defendant has not paid the same to the plaintiff.

[Demand of Judgment.]

§ 1364. **Voluntary Payment.**—Under a bond conditioned to indemnify the obligee against being compelled by law to pay a second time a sum claimed and paid to the obligor, if the obligee is subsequently sued by two other persons separately claiming the same sum, and interpleads such plaintiffs by suit in chancery, and by leave obtained pays the money into court, this is not a breach of the bond, for it is a voluntary payment.[1]

[1] Massey v. Schott, Pet. C. C. 122.

CHAPTER VI.

PROMISE OF MARRIAGE.

§ 1365. For Refusal to Marry.

Form No. 364.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore, to wit, on the ..... day of ....., at ....., in consideration that the plaintiff, being then sole and unmarried, at the request of the said defendant, had then promised the said defendant to marry him, the said defendant, on request, the defendant promised to marry the plaintiff within a reasonable time [or if a time certain was agreed upon, state the time].

II. That the plaintiff, confiding in said promise, has always since remained and continued, and still is, sole and unmarried, and has been for and during the time aforesaid, and now is, ready and willing to marry the defendant.

III. That the defendant refuses to marry the plaintiff, although a reasonable time elapsed before this action [or although she, on the ..... day of ..... requested him so to do], to her damage in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1366. When Action Lies—Necessary Averments.—Marriage is a consideration as valuable as money, if *bona fide*.[1] And the action on the promise to marry is sustainable only when the contract is mutual.[2] And though one of the parties be an infant, the contract is binding on the other.[3] But an executor can not sue.[4] A man may maintain an action for breach of promise to marry.[5] But an action for breach of promise of marriage will not be made to survive by proof that the promisee had a child, born out of wedlock, now living, and that the defendant is the father of said child.[6] Deceit and injury are presumed from the breach, and need not be alleged.[7] Where the promise is special, as "after the death of the defendant's father," it should be so declared on, with proper averments.[8]

[1] Magniac v. Thompson, 1 Baldw. 344.

[2] 1 Roll. Abr. 2215; Wells v. Padgett, 8 Barb. 323.

[3] Holt v. Clareucieux, 2 Stra. 937; Bac. Abr., Infant; Willard v. Stone, 7 Cow. 22.

[4] Chamberlain, Adm'r etc., v. Williamson, 2 M. & S. 408.

[5] Harrison v. Cage, 1 Ld. Raym. 386.

[6] Hovey v. Page, 55 Me. 142.

[7] Leopold v. Poppenheimer, 3 Code R. 39.

[8] 2 Peake, 103; Chit. on Cont. 426,

But it is not necessary that the time of marriage should be specified.[1] But if the promise was to marry on a particular day, it should be so stated.[2]

§ 1367. **Evidence of Promise.**—Positive proof of request and refusal is never required; but they may be inferred from circumstances, and the request may be made by the father or other friend, whose authority may be inferred from existing relations.[3] The plaintiff must, however, aver a special request or an offer to perform. A bare allegation of readiness and willingness is not sufficient.[4] In an action for breach of promise of marriage, the declaration of the defendant that he would make a good home for the plaintiff, made at the time, and as part of his conversations with the plaintiff, which are declared on as establishing the promise of marriage, are admissible in connection with the other conversations, as tending to prove the contract.[5]

§ 1368. **Promise, when Void.**—An agreement by a man to marry when a divorce should be decreed between himself and his wife in a suit then pending, is contrary to public policy, and void.[6] No action can be maintained for a breach of promise of marriage made in consideration of illicit sexual intercourse between the parties.[7]

§ 1369. **Promise After Seduction.**—A promise of marriage made after seduction has been effected, and in consequence thereof, is not thereby rendered invalid. It is not liable to the objection that it encourages immorality, because the wrong has been already perpetrated;[8] and where a seduction is accomplished by means of a promise of marriage on the part of the seducer, a consent of the female to marry the seducer, amounting to a mutual promise on her part to marry, may be implied.[9]

§ 1370. **Damages.**—Damages for pecuniary loss may be recovered, as for loss of time in preparing for marriage;[10] as well as for suffering and injury to prospects in life;[11] and seduction will aggravate the breach.[12] Special damages for impaired health may be alleged and proved, if resulting from the breach.[13]

[1] Carth. 467.
[2] Hoppe v. Symonds, 2 Chit. 324; see Phillips v. Crutchley, 7 Id 409; The King v. Woolf, 1 M. & P 239
[3] Prescott v. Guyler, 32 Ill. 312; Hotchkins v. Hodge, 38 Barb. 117.
[4] Martin v. Patton, 1 Littell (Ky.), 234; Greenup v. Stoker, 3 Gilm. 212.
[5] Button v. McCauley, 5 Abb. Pr. (N. S.) 29.
[6] Noice v. Brown, 38 N. J. L. 228.
[7] Steinfeld v. Levy, 16 Abb. Pr. (N. S.) 26; Hanks v. Naglee, 54 Cal. 51.
[8] Hotchkins v. Hodge, 38 Barb. 117.
[9] People v. Kenyon, 5 Park. Cr. 254.
[10] Smith v. Sherman, 4 Cush. 408.
[11] 1 Pars. on Contr. 543.
[12] Wells v. Padgett, 8 Barb. 323; Leavitt v. Cutler, 37 Wis. 46.
[13] Bedel v. Powell, 13 Barb. 183.

Whatever damages the plaintiff may have suffered in consequence of the defendant's refusal to marry her, she is legitimately entitled to recover; and these damages are to be estimated from the circumstances of the parties, and the situation in which the plaintiff is left by the defendant's refusal to perform his contract.[1] The interposition of the defense that the character of the plaintiff is unchaste, even if unsuccessful, ought not, *per se*, to aggravate the damages, unless it is interposed in bad faith, from malice, wantonness, or recklessness.[2]

§ 1371. **For Marriage with Another.**

Form No. 365.

[Title.]

The plaintiff complains, and alleges:

I. and II. [Same as preceding form].

III. That the defendant afterwards married a certain other person, to wit, one A. B., contrary to his said promise to the plaintiff.

[Or, III. That at the time of making said promise the defendant represented to the plaintiff that he was unmarried, whereas, in fact, he was then married to another person, of which fact the plaintiff had no notice.]

[Demand of Judgment.]

§ 1372. **Married Man Liable.**—A single woman to whom a man in fact married represents that he is single, and promises marriage, may maintain an action against him for his breach of promise.[3]

§ 1373. **Request.**—In case of the marriage of defendant, a request need not be alleged.[4] The averment of marriage dispenses with request.[5]

§ 1374. **Statute of Frauds.**—A parol contract of marriage that may be performed at any time within three years, and consequently within one year, is not within the Indiana statute of frauds; but if not to be performed within one year, it is within the statute.[6]

[1] Tubbs v. Van Kleek, 12 Ill. 449.
[2] Powers v Wheatley, 45 Cal. 113.
[3] Wild v. Harris, 7 C. B. 999; 1 E. L. & E. 408; Blattmacher v. Saal, 29 Barb. 22; 7 Abb. Pr. 409.
[4] 1 Parsons on Contr. 544; Short v. Stone, 8 Q. B. 358; Caines v. Smith, 15 Mee. & W. 189; compare Lovelock v. Franklyn, 8 Q. B. 371; Turner v. Baskin, 2 W. Law M. 98.
[5] Short v. Stone, *supra*.
[6] Paris v. Strong, 51 Ind. 339.

CHAPTER VII.

SALE AND DELIVERY OF CHATTELS.

§ 1375. Seller against Purchaser for Refusing to Receive and Pay for Goods.

Form No. 366.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff and defendant entered into an agreement in substance as follows [state the agreement].

II. That the plaintiff duly performed all the conditions of said contract on his part, and was on the ..... day of ....., 18..., at..... [the day and place of delivery], ready and willing to deliver said property, and tendered the same to the defendant.

III. That defendant refused to accept said goods, or pay for them, pursuant to said agreement, to the damage of the plaintiff ..... dollars.

[Demand of Judgment.]

§ 1376. Delivery—Constructive.—A statement of circumstances constituting a constructive delivery as equivalent to an actual delivery, should be unequivocal.[1] A delivery to the purchaser of a city weigher's certificate of sugar lying on the wharf is a sufficient delivery.[2] The delivery of the export entry is not a delivery of the article sold.[3] Mere delivery of a bill of parcels is not sufficient.[4] The delivery of an order on the custom-house, when the buyer fraudulently intends not to pay, knowing his inability to do so, is no delivery.[5] The delivery, with indorsement, of a shipping broker's acknowledgment of the receipt of merchandise to be transported, drawn in the form of a bill of lading, but not signed by the carrier, is sufficient to constitute a constructive delivery of merchandise to one who made advances upon the faith of it.[6] An order on the depositary of goods sold, given by the vendor to the vendee, constitutes a delivery as between themselves.[7] The transfer of warehouse receipts operates as a constructive delivery of the goods.[8]

[1] Bailey v. Ogden, 3 Johns. 399.
[2] Glasgow v. Nicholson, 25 Mo. 29.
[3] Johnson v. Smith, Anth. N. P. 81.
[4] Smith v. Mason, Anth. N. P. 225.
[5] Ives v. Polak, 14 How. Pr. 411.
[6] Reed v. Proprietors etc., 8 How. U. S. 284; Bank of Rochester v. Jones, 4 Comst. 497; Rawls v. Deshler, 28 How. Pr. 66.
[7] Sigerson v. Harker, 15 Mo. 101.
[8] Burton v. Curyea, 40 Ill. 320.

§ 1377. **Delivery of Less Quantity.**—If a vendor delivers a less quantity of goods than he contracted to deliver, the vendee is at liberty to refuse to accept, and if he accepts a part, he may return that, and refuse to accept less than the whole, but having received and retained a part, he can not refuse to pay for the part received.[1]

§ 1378. **Delivery—In General.**—Selecting goods, and putting them aside in the seller's shop, held sufficient delivery.[2] The delivery of the keys of a warehouse in which goods sold are deposited is a sufficient delivery.[3] Merely taking samples does not amount to a delivery.[4] There can be no delivery so long as any thing remains to be done by the seller to ascertain the quantity or quality of the goods,[5] or so long as anything remains to be done by either party to ascertain the price.[6] Cumbersome and heavy articles may be delivered without actual removal. Delivering a schedule, followed by an agreement on the part of the buyer with the depositary for keeping charge of them, is sufficient.[7]

§ 1379. **Delivery, how Alleged.**—Tender and refusal of goods on the part of the principals is equivalent to delivery, and may be specially averred.[8] A performance of all the conditions on his part may be alleged.

§ 1380 **Growing Crops, Delivery and Sale of.**—A growing crop, until ready for the harvest, can not by itself become the object of a delivery, and can only be delivered into the possession of the vendee by delivering to him the possession of the land also of which it is a part.[9] Growing crops are not unlike ships and cargoes at sea in respect to their delivery, of which delivery can not be made until they reach port. If delivery be made within a reasonable time after reaching port, the sale is good as against creditors and subsequent purchasers.[10] They are not subject to manual delivery until they are harvested, and therefore until harvested they are not in the possession or under the control of the vendor, within the meaning of the statute of frauds.[11] A growing crop, while growing, and until

[1] Polhemus v. Heiman, 45 Cal. 573; Shields v. Pettee, 2 Sandf. 262.

[2] Brewer v. Salisbury, 9 Barb. 511.

[3] Wilkes v. Ferris, 5 Johns. 335; Gray v. Davis, 10 N. Y. 285.

[4] Johnson v. Smith, Anth. N. P. 81; Carver v. Lane, 4 E. D. Smith, 168.

[5] Cunningham v. Ashbrook, 20 Mo. 553; Outwater v. Dodge, 7 Cow. 85; aruthers v. McGarvey, 41 Cal. 15.

[6] Ward v. Shaw, 7 Wend. 404.

[7] Dixon v. Buck, 42 Barb. 70.

[8] Kemble v. Wallis, 10 Wend. 374.

[9] Davis v. McFarlane, 37 Cal 634.

[10] Joy v. Sears, 9 Pick. 4; Portland Bank v. Stacey, 4 Mass. 661; Buffington v. Curtis, 15 Id. 528.

[11] Bours v. Webster, 6 Cal. 660; Visher v. Webster, 13 Id. 58; Pacheco v. Hunsacker, 14 Id. 120; Bernal v. Hovious, 17 Id. 541; Robbins v. Ola-

ready for the harvest, is also unaffected by the fifteenth section of the statute in relation to the sale of goods and chattels in the possession and under the control of the vendor.[1] Contracts for the sale of growing periodical crops are not within the statute of frauds, and therefore need not be made in writing.[2] So a contract to deliver corn not yet gathered or husked, as it requires labor to be expended on the subject-matter to prepare it for delivery, is not within the statute of frauds.[3] It is not the policy of the law to interdict sales of growing crops by declaring them absolutely fraudulent, on the mere ground that the seller retains, as he must necessarily do, the possession of the property until it shall become susceptible of actual delivery.[4]

§ 1381. **Delivery by and Liability of Carrier.**—Upon demand by the vendor, while the right of stoppage *in transitu* continues, the carrier will become liable for the conversion of the goods, if he decline to redeliver them to the vendor, or delivers them to the vendee.[5] And a notice, without demand, to redeliver, is sufficient to charge the carrier, if he is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*.[6] And notice to the agent of the carrier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier.[7]

§ 1382. **Ship and Cargo, Delivery of.**—If the delivery of a ship and cargo be made within a reasonable time after reaching port, the sale is good as against creditors and subsequent purchasers.[8]

§ 1383. **Rescission of Contract—Partial Rescission.**—To rescind a contract for the sale of a chattel, the property must be returned, unless it be valueless to both parties.[9] To constitute an actual rescission of the contract, a redelivery of the goods is necessary.[10] Where M. sold B. eight bags of wool, sepa-

han, 5 Duval (Ky.), 28; cited in Davis v. McFarlane, 37 Cal. 634.

[1] Davis v. McFarlane, 37 Cal. 634.

[2] Davis v. McFarlane, 37 Cal. 634; citing Marshall v. Ferguson, 23 Id. 66.

[3] Rentch v. Long, 27 Md. 188; see Stephens v. Santee, 51 Barb. 532.

[4] Davis v. McFarlane, 37 Cal. 634; citing Whipple v. Foot, 2 Johns. 418.

[5] Reynolds v. Boston etc. Railroad, 43 N. H. 580; Markwald v. His Creditors, 7 Cal. 213; Blackman v. Pierce, 23 Id. 508; O'Neil v. Garrett, 6 Iowa, 480; Jones v. Earl, 37 Cal 630.

[6] Reynolds v. Boston etc. Railroad, 43 N. H. 580; Litt v. Cowley, 7 Taunt. 169; Whitehead v. Anderson, 9 M. & W. 518; Bell v. Moss, 5 Whart. 189.

[7] Bierce v. Red Bluff Hotel Co., 31 Cal. 160; cited in Jones v. Earl, 37 Id. 630.

[8] Joy v. Sears, 9 Pick. 4; Portland Bank v. Stacy, 4 Mass. 661; Buffington v. Curtis, 15 Id. 528.

[9] Perley v. Balch, 23 Pick. 283; Christy v. Cummins, 3 McLean, 386; Henckley v. Hendrickson, 5 Id. 170; Garland v. Bowling, Hempst. 710.

[10] Miller v. Smith, 1 Mason, 437.

rately marked and kept as one lot of a particular kind, at one dollar a pound, by one bill of parcels, B. having first opened some of the bags, but part of the wool in one bag was of a different kind, and B., without returning the bag, sent back the contents which M. refused to receive, it was held that B. could not partially rescind the contract, and that a custom in such cases to return the bale found different was inadmissible, the bag not having been returned; but that B., on proving a warranty and breach, could recoup the difference between the actual value and the value if it had corresponded to the warrant.[1]

§ 1384. **Sales Defined—Void Sales.**—A contract to deliver twenty sheep in four years for ten delivered now, is a sale, and not a bailment.[2] The delivery, by a debtor to his creditor, of property, the value of which was to be applied upon the debt in good faith, is a sale. If a standard or criterion is agreed upon by which the value should be fixed, and the amount realized by that criterion was the amount to be applied in part satisfaction of the debt, that is fixing the price sufficiently to make the sale valid.[3] To constitute a valid sale of a chattel, so as to change the property therein, an agreement as to price and delivery of the chattel is requisite, except in case of a vessel at sea, when the transfer is effected by the bill of sale;[4] and also of growing crops. A valid sale may be made of personal goods which are out of possession, and the sale will be of the thing itself, and not of a chose in action.[5] A sale in violation of a statutory prohibition is void, and no action can be maintained upon it. So of a sale contravening a license law.[6] When the substance of the thing sold is not in existence at the time of the sale, such sale is void.[7]

§ 1385. **Statute of Frauds.**—A contract for the sale of goods, chattels, or things, in action at a price not less than two hundred dollars is invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, or unless the buyer accept or receive part of such goods or chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of his sale,

[1] Morse v. Brackett, 98 Mass. 205.

[2] Bartlett v. Wheeler, 44 Barb. 162. The distinction between a sale and an exchange explained: Preston v. Keene, 14 Pet. 133.

[3] Dixon v. Buck, 42 Barb. 70.

[4] Harper v. Dougherty, 2 Cranch C. Ct. 284.

[5] The Sarah Ann, 2 Sumn. 206.

[6] Best v. Bauder, 29 How. Pr. 489.

[7] Bertram v. Lyon, 1 McAll. 53; affirmed, 20 How. U. S. 150.

of the kind of property sold, the terms of sale, the price, and the names of the purchaser, and the person on whose account the sale is made, is a sufficient memorandum.[1] In determining whether the statute of frauds applied to a sale of goods, delivered to one person at the request of another, the true test is whether there is any liability of the vendee to the vendor; for if there is, then the promise of the guarantor is collateral, and must be in writing. Where the sale was entered on the vendor's book as "sold A. B.; C. D. security," and the bill was made out thus: "A. B. (through C. D.) bought," etc., and it was shown that the vendors had urged C. D. to get security from A. B., and offered to pay him for so doing, it was held that C. D. could not be regarded as the principal debtor.[2]

§ 1386. **Stoppage in Transitu.**—This is a right which the vendor, in goods sold upon credit, has to recall them or retake them upon the discovery of the insolvency of the vendee, before the goods have come into his possession, or any third party has acquired *bona fide* rights in them. And it continues so long as the carrier remains in the possession and control of the goods, or until there has been an actual or constructive delivery to the vendee, or some third person has acquired a *bona fide* right to them.[3] A consignor of property *in transitu* has a right to direct a change in its destination, and its delivery to a different consignee.[4] A vendor who had constructively delivered iron lying at his furnace, by pointing it out to the vendee and charging it to him in his books, receiving the vendee's notes for the same, may retain the same for the price, if, while it is still in his custody, and said notes are unpaid, the vendee becomes insolvent.[5]

§ 1387. **Measure of Damages.**—In an action against a purchaser for not receiving goods according to contract, the rule of damages is the difference between the contract price and the market value at the time of the breach of the contract.[6]

§ 1388. **Tender.**—The refusal of a buyer to take the goods which he has contracted to buy, dispenses with any necessity on the part of the seller to make a tender of them.[7] Under a contract for the sale and delivery of oats "within thirty days," the obligation to receive is as strong as the obligation to deliver. And the contractor is not bound to deliver after the contract

[1] Cal. Civil Code, sec. 1624.
[2] Read v. Ladd, 1 Edm. 100.
[3] Jones v. Earl, 37 Cal. 630.
[4] Strahorn v. Union Stock Yard etc. Co., 43 Ill. 424.
[5] Thompson v. Baltimore and Ohio R. R. Co., 28 Md. 396.
[6] Haskell v. McHenry, 4 Cal. 411.
[7] Calhoun v. Vechio, 3 Wash. C. Ct. 165.

has expired, but if he does, it will be at the contract price.[1] A complaint on a contract in which the defendant agrees to purchase a given quantity of hay, then in a stack, from the plaintiff, and pay a fixed sum therefor at a fixed time, and the hay to be weighed at the stack, should aver, if the hay has not all been delivered, a readiness or offer on the part of the plaintiff to deliver.[2] Before an action can be maintained for defendant's failure to accept and pay for property which he agreed to purchase at a future time, a tender of the property and demand of payment must be made [3] A tender of warehouse receipts for grain issued by responsible parties is a sufficient tender of the grain, in Chicago, unless objected to by the other party at the time.[4]

§ 1389. **Tender Waived.**—After a sale at buyer's option, within a certain time, notice by the buyer before the time has expired that he will not accept goods within or at the end of such time, waives a tender by the seller.[5]

§ 1390. **Tender and Demand.**—Under a contract for the purchase of goods, where the right of property is not passed by the contract, the buyer is not bound to accept the articles when tendered, unless they correspond in quality with what was bargained for.[6] The contract is entire, and calls for an entire performance.[7]

§ 1391. **The Same—On Contract made by Broker.**

Form No. 367.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., the plaintiffs and defendants entered into an agreement by the hand of A. B., a broker duly authorized to make the same, both on behalf of the plaintiffs and of the defendants, of which the following is a copy [copy it].

II. That at the time of making said contract, the defendants paid to the plaintiff the sum of ..... dollars stated therein.

III. That the plaintiffs were at all times, within said ..... days, ready and willing to comply with the terms of said contract on their part, and within the ..... days mentioned in said contract, to wit, on the ..... day of ....., 18..., at .....,

[1] Gibbons v. United States, 2 Ct. of Cla. R. (Nott & H.) 421.
[2] Barron v. Frink, 30 Cal. 486.
[3] Hagar v. King, 38 Barb. 200.
[4] McPherson v. Gale, 40 Ill. 368.
[5] McPherson v. Walker, 40 Ill. 371; see White v. Dobson, 17 Gratt. (Va.) 262; Millinger v. Daly, 56 Penn. St. 245.
[6] Add. on Contr. 238; Reimers v. Ridner, 17 Abb. Pr. 292.
[7] Smith v. Brady, 17 N. Y. 173; Catlin v. Tobias, 26 N. Y. 217; see also Polhemus v. Heiman, 45 Cal. 573.

they tendered the said property to the defendants and demanded payment of the balances of the price thereof.

IV. That the defendants refused to receive said property, or pay the balance of the price therefor.

V. That they have not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1392. **Acceptance.**—There must be an acceptance, as well as a delivery, to take the thing out of the statute; but the acceptance may be by agent of the buyer.[1] But the acceptance of a mere shop-boy is not sufficient.[2] An acceptance of goods bearing a name different from the one used in the sale note by a sub-vendee of part of goods sold, does not conclude the vendee as to the whole contract.

§ 1393. **The Same—On Promise to Pay by a Good Bill of Exchange.**

Form No. 368.

[TITLE]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff and defendant mutually agreed with each other as follows: The plaintiff agreed to sell and deliver to the defendant forty tons of iron, at the price of ..... per hundred weight on the day ..... of ....., 18..., at ....., and the defendant then promised the plaintiff to pay him for said iron, by a bill of exchange at three months' date on delivery of said iron, and that such bill should be satisfactory to the plaintiff.

II. That afterwards, on the ..... day of ....., 18..., at ....., the plaintiff delivered the said quantity of iron to the defendant, upon the terms aforesaid, amounting to ..... dollars.

III. That the plaintiff, on the ..... day of ....., 18..., at ....., demanded of the defendant payment of the price of said iron, by such bill of exchange, and was then, and has been since always ready and willing to take the same.

IV. That the defendant has not paid the plaintiff the price of the iron by a bill of exchange payable in three months from the date thereof, which was satisfactory to the plaintiff, or otherwise according to said agreement.

[DEMAND OF JUDGMENT.]

§ 1394. **The Same—For not Returning Goods, or Paying for Them in a Reasonable Time.**

Form No. 369.

[TITLE.]

The plaintiff complains, and alleges:

[1] Outwater v. Dodge, 6 Wend. 397. [2] Smith v. Mason, Anth. N. P. 225. [3] Flint v. Lyon, 4 Cal. 17.

I. That on the ..... day of ....., 18 .., at ....., the plaintiff, at the request of the defendant, delivered to him [describe the property], of the value of ..... dollars, upon the condition and consideration that the defendant would purchase the same for ..... dollars, or return the same to the plaintiff within a reasonable time, which the defendant then and there agreed to do.

II. That the plaintiff duly performed all the conditions of said agreement on his part.

III. That a reasonable time for the defendant to purchase and pay for said goods, or to return the same to the plaintiff, has elapsed before the commencement of this action.

IV. That the defendant has not purchased said goods or paid for them, nor has he returned the same to the plaintiff.

[DEMAND OF JUDGMENT.]

§ 1395. **Alternative.**—A contract in the alternative should be so set forth.[1] And an averment of demand of one of two things, when the option of the defendant was in the alternative, is not sufficient.[2]

§ 1396. **The Same—For not Giving Security According to the Conditions of the Sale at Public Auction, the Credit not having Expired.**

Form No. 370.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 .., at ....., the plaintiff caused to be put up and exposed for sale by public auction, in lots, certain goods and chattels, one of the said lots being a certain carriage, subject to the following terms, to wit: that the highest bidder should be the purchaser, and that the purchaser should be allowed seven months' credit for the payment of the price, after giving such security as should be approved of by A. B. on the part of the plaintiff; or that such purchaser should, at his election, pay down the purchase price at the time of the sale, and in that event that ..... per cent should be deducted, by way of discount, from the amount of the purchase money, of all of which said terms the defendant, at the time of the sale, had notice.

II. That at the said sale the defendant was the highest bidder for, and was declared to be the purchaser of the said carriage, subject to said terms of sale, for ..... dollars.

[1] Hatch v. Adams, 8 Cow. 35; Stone v. Knowlton, 3 Wend. 374; People v. Tilton, 13 Id. 597.

[2] Lutweiler v. Linnell, 12 Barb. 512.

III. That the plaintiff then delivered the carriage to the defendant, as such purchaser, and was then and has since been, always ready and willing to perform the said contract on his part.

IV. That the defendant has not, although then requested by the plaintiffs, paid any part of the said sum of ..... dollars, nor has he given any security for the same, according to the said terms of sale.

[DEMAND OF JUDGMENT.]

§ 1397. **For a Deficiency on a Resale.**

Form No. 371.

[TITLE.]

The paintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., he put up at auction, at the auction house of ....., city of ....., in this state, sundry [articles of merchandise], subject to the condition that all goods not paid for and removed by the purchaser thereof within [ten days] after the sale, should be resold at auction on his account, of which condition the defendant had notice.

II. That the defendant purchased [two hundred barrels of flour] at the said auction, at the price of ..... dollars.

III. That the plaintiff was ready and willing to deliver the same to defendant on the said day, and for [ten days] thereafter, and on [etc.] offered to do so, and demanded payment therefor.

IV. That the defendant did not take away or otherwise receive the said goods purchased by him, nor pay for them or any of them within [ten days] after the sale, nor afterward.

V. That on the ..... day of ....., 18.., at ....., having first given the defendant reasonable notice of the time and place of resale, the plaintiff resold the said [two hundred barrels of flour], on account of the defendant, by public auction, for ..... dollars.

VI. That the expenses attendant upon such resale amounted to ..... dollars.

VII. That defendant has not paid the deficiency thus arising, amounting to ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1398. **Conditional Sales.**—A vendor of goods, which he delivers, but the title to which is to remain in him until they are paid for, may recover them in the hands of a *bona fide* purchaser from the vendee.[1] In a conditional sale, the right of the

[1] Parmlee v. Catherwood, 36 Mo. 479; Putnam v. Lamphier, 36 Cal. 151; Kohler v. Hayes, 41 Id. 455.

seller to take possession after a default and sell the property, may be defeated by performance or an offer or tender of performance by the purchaser, and a sufficient tender gives the buyer a right to the property.[1] So he may recover the value of the goods less the amount of purchase money unpaid at the time of the tender, and the necessary expenses of the vendor in removing and taking care of it.[2]

§ 1399. **Rights of Vendor.**—If the vendor, upon default of the vendee, may at his option rescind the contract, he may take possession and resell the property; but this involves no forfeiture of the amount already paid.[3] The seller becomes, on refusal to accept, the agent of the buyer, with power to sell.[4]

§ 1400. **Right of Resale.**—Where the buyer wrongfully refuses to receive and pay for the goods sold, the seller has the right, as soon as he can with due regard to the interest of the buyer, and after giving him notice of his intention to resell, to sell the goods, and to recover the difference between the agreed price and the sum realized at the sale, together with expenses, from the buyer.[5] The buyer is not entitled to specific notice of the time and place of the resale.[6] But he must dispose of the goods in good faith.[7]

§ 1401. **By Manufacturer for Goods Made at Defendant's Request and not Accepted.**

Form No. 372.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant agreed with the plaintiff that the plaintiff should make for him [ten casks], and that defendant should receive for the same, upon delivery thereof ..... dollars.

II. That the plaintiff made the said casks, and on the ..... day of ....., 18.., offered to deliver the same to defendant and has ever since been ready and willing to do so.

III. That defendant has not paid for the same, nor any part part thereof.

[DEMAND OF JUDGMENT.]

§ 1402. **Breach of Contract.**—If one contracts to make merchantable lumber for another, and the other takes away un-

[1] Hutchings v. Munger, 41 Barb. 396; Miller v. Steen, 30 Cal. 403; cited in S. C., 34 Id. 144.

[2] Miller v. Steen, 34 Cal. 144.

[3] Miller v. Steen, 30 Cal. 407.

[4] Sands v. Taylor, 5 Johns. 385.

[5] 2 Kent's Com. 504; Cross v. Billings, 1 Salk. 3; Holmes v. Hull, 6 Mod. 162; Maclean v. Dunn, 4 Bingh. 722; Pollen v. Le Roy, 30 N. Y. 549; compare Healy v. Utley, 1 Cow. 345.

[6] Bogart v. O'Regan, 1 E. D. Smith, 590; McEachron v. Rundalls, 34 Barb. 301. This has been disapproved in Ingram v. Matthieu, 3 Mo. 209.

[7] Crooks v. Moore, 1 Sandf. 297.

merchantable lumber contrary to the wish and orders of the maker, this is not a breach of the contract on the part of the maker.[1]

§ 1403. **Manufacturing Goods.**—A contract to deliver goods to be manufactured by the party agreeing to deliver, is not an agreement for the sale of goods within the the statute.[2] So flour, contracted to be manufactured and delivered, is not within the statute.[3]

§ 1404. **Causes of Action.**—Where the person ordering the goods refuses to take them when made, it has been held that the maker may deliver to a third party, with notice to the defendant, and sue for goods sold.[4]

§ 1405. **Materials Found.**—It has been held that the plaintiff can not, on an account for goods sold, recover merely upon proof of materials found by him, and used in services rendered.[5]

§ 1406. **Title to Property.**—Where the plaintiff sold a number of bales of drillings to A., for the purpose of making sacks, deliverable to A., as fast as he needed them for manufacturing, and A. agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking them as fast as he should pay, it was held that the title rested in A., and plaintiff had no lien thereon, or on the sacks, until delivered to him.[6]

§ 1407. **For Breach of Promise, by Purchaser of Good Will, not to Carry on Rival Trade.**

Form No. 373.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore the defendant carried on the business of ....., at .....; and on or about the .... day of ....., 18..., in consideration that the plaintiff would purchase from him his store and goods therein, for the sum of ..... dollars, and the good will of the said business for the sum of ..... dollars, the defendant agreed with the plaintiff that he would not at any time thereafter, by himself, or partner, or agent, or otherwise, either directly or indirectly, set up or

[1] Hale v. Trout, 35 Cal. 229.

[2] Crookshank v. Burrell, 18 Johns. 58; Sewall v. Fitch, 8 Cow. 215; Courtwright v. Stewart, 19 Barb. 455; Donovan v. Wilson, 26 Id. 138; Parker v. Schenck, 28 Id. 38; Robertson v. Vaughan, 5 Sandf. 1.

[3] Bronson v. Wiman, 10 Barb. 406.

[4] Bement v. Smith, 15 Wend. 493.

[5] Cottrell v. Appsey, 6 Taunt. 322.

[6] Hewlett v. Flint, 7 Cal. 264.

carry on the business of a ....., at ....., or at any other place within the city of .....

II. That the plaintiff accordingly purchased from the defendant his said ....., for the price and at the terms aforesaid, and paid said sum of ..... dollars for the said store and goods, and the good will of said business.

III. That the plaintiff duly performed all the conditions of said agreement on his part.

IV. That the defendant afterwards, to wit, on the ..... day of ....., 18.., set up and carried on the business of ....., at .....

[DEMAND OF JUDGMENT.]

§ 1408. **Acceptance.**—The acceptance of the property precludes an action by the buyer against the seller, for damages, on the ground that the articles actually furnished do not correspond with the contract.[1] The buyer, by retaining the property without notice to the seller, waives all remedy upon the contract for any breach of an obligation implied by law, *e. g.*, the obligation to deliver an article of merchantable quality.[2]

§ 1409. **Agent, Purchase from.**—An allegation that the goods were purchased of A., the agent, then and there acting for defendant, is sufficiently certain to prevent any misapprehension of its meaning, and is the same as if the allegation was of the purchase from defendant.[3]

§ 1410. **Buyer against Seller, for not Delivering Goods Sold.**

Form No. 374.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred sacks of potatoes] to the plaintiff [on the ..... day of ..... , 18..], and that the plaintiff should pay therefor ..... dollars on delivery.

II. That on the said day, the plaintiff was ready and willing, and offered to pay the defendant the said sum, upon delivery of the said goods.

III. That the defendant has not delivered them.

[DEMAND OF JUDGMENT.]

[1] Reed v. Randall, 29 N. Y. 358; Fitch v. Carpenter, 43 Barb 40.

[2] Fisher v. Samuda, 1 Camp. 190; Milner v. Tucker, 1 Car. & P. 15; Halliday v. McDougall, 20 Wend. 61; Hargous v. Stone, 5 N. Y. 73; Shields v. Pettee, 2 Sandf. 262; Howard v. Hoey, 23 Wend. 350; 1 Stark. 477; 2 Kent, 480; Pars. on Cont. 475; Reed v. Randall, 29 N. Y. 350.

[3] Cochrane v. Goodman, 3 Cal. 244.

§ 1411. **Action by Assignee.**—Where plaintiff contracted for the delivery of a quantity of lumber after a certain time, and on three days' notice, and assigned the contract to another, the delivery and payment were concurrent acts.[1] In case of an assignment by the buyer, the demand of performance of a condition precedent on the part of the vendor must be made upon the vendor, and not alone upon the assignor.[2] Where a party who has purchased goods by fraudulent representations, assigns them in payment of a pre-existing debt to one who takes them *bona fide*, without notice of the fraud, the latter acquires a good title as against the original vendor.[3]

§ 1412. **Condition Precedent.**—Where defendants stipulated to sell plaintiff certain merchandise "shipped" from Batavia, and the parties agreed that the contract should be binding until the arrival of the ship, its arrival is a condition precedent, which must be shown before either party can maintain an action.[4]

§ 1413. **Damage.**—In an action for not delivering the thing sold, the measure of damages is the value at the time of the breach.[5]

§ 1414. **Delivery—Time.**—If a contract or order under which goods are to be furnished does not specify any time at which they are to be delivered, the law implies a contract that they should be delivered in a reasonable time; and no evidence will be admissible to prove a specific time at which they were to be delivered, for that would be to contradict and vary the legal interpretation of the instrument.[6]

§ 1415. **Demand, Averment of.**—A complaint, alleging that the defendant sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a guaranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same and refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty.[7] The true point at issue is, whether the defendant undertook to deliver. From the nature of the sale it operated as a delivery.

[1] Fruit v. Phelps, 4 Cal. 282.

[2] Dustan v. McAndrew, 10 Bosw. 180.

[3] Butters v. Haughwout, 42 Ill. 18. But see Robinson v. Haas, 40 Cal. 474, where it is held that a sale of personal property passes to the purchaser only such title as the vendor had.

[4] Middleton v. Ballingall, 1 Cal. 446; Russell v. Nicoll, 3 Wend. 112; Shields v. Pettie, 4 N. Y. 122; Benedict v. Field, 16 N. Y. 595.

[5] Hopkins v. Lee, 6 Wheat. 109; Blydenburgh v. Welsh, 1 Bald. 331; Shepherd v. Hampton, 2 Wheat. 200.

[6] Cocker v. Franklin Manufacturing Co., 3 Sumn. 530; see Terwilliger v. Knapp, 2 E. D. Smith, 86.

[7] Dabovich v. Emeric, 7 Cal. 209.

There was no necessity of a demand on defendant, unless for the purpose of enabling him to comply with his guaranty.[1]

§ 1416. **Executory Agreements.**—Executory agreements for the sale of goods are within the statute, as well as other contracts.[2] A contract for the sale and delivery, if so completed as to be valid in the state where made, will be enforced in Missouri.[3]

§ 1417. **Memorandum.**—An agreement of sale signed only by the seller, but delivered to and accepted by the buyer, will sustain the buyer's action for non-delivery.[4] The memorandum of a clerk of a seller of sales made by him at auction, is sufficient to bind the purchaser.[5] The memorandum required of a contract of sale is not binding upon the seller, unless signed by the buyer also.[6] This, however, was under a statute requiring the memorandum to be signed by the parties to be charged thereby.

§ 1418. **Offer to Perform.**—The averments in a declaration that the "plaintiff was ready and willing" to receive goods, and pay for them on delivery and shipment, is a material one, and necessary to be proved.[7]

§ 1419. **Several Causes of Action.**—A complaint which states the facts of the case in ordinary and concise language is not demurrable because such statement shows that the plaintiff is entitled to recover upon two different legal grounds.[8] But it has been held that the purchaser of a chattel can not, in the same action, seek delivery of possession of it, and damages for the non-delivery; the one being an action for a tort, the other upon contract.[9]

§ 1420. **Tender.**—Where a party contracts for a quantity of wheat to be delivered on demand, and paid for on delivery, in action for non-delivery it is unnecessary for plaintiffs to aver and prove a tender of the purchase money at the time of demand or before suit.[10]

§ 1421. **Warehouseman.**—A complaint against a warehouseman, which does not allege that the goods belonged to the plaintiff, or that defendant was under an obligation to deliver them to him, is bad.[11]

[1] Dabovich v. Emeric, 7 Cal. 209.
[2] Bennett v. Hull, 10 Johns. 364.
[3] Houghtaling v. Ball, 20 Mo. 563.
[4] Egerton v. Mathews, 6 East, 307; Tisdale v. Harris, 20 Pick. 9; Stevewright v. Archibald, 17 Q. B. 103.
[5] Frost v. Hill, 3 Wend. 386.
[6] See Justice v. Lang, 30 How. Pr. 425.
[7] Robinson v. Tyson, 46 Penn. St. 286.
[8] Mills v. Barney, 22 Cal 240.
[9] Furniss v. Brown, 8 How. Pr. 59; Maxwell v. Farnam, 7 Id. 236.
[10] Crosby v. Watkins, 12 Cal. 85.
[11] Thurber v. Jones, 14 Wis. 16.

§ 1422. **The Same—For not Delivering within a Specified Time.**

Form No. 375.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ...., 18..., at ... ., the plaintiff agreed with the defendant to buy of him, and the defendant then agreed to sell to the plaintiff, and to deliver to him on the ..... day of....., 18..., at ....., ... bushels of oats, at the price of ..... cents per bushel, to be paid for on the delivery thereof.

II. That the said time for the delivery of the said oats has elapsed, and that plaintiff has always been ready and willing to receive the said oats, and to pay for them at the price aforesaid, on delivery, according to the terms of said agreement, of all which the defendant had notice.

III. That the defendant has not delivered the same, nor any part thereof, to the plaintiff, at ....., or elsewhere.

IV. That the plaintiff has thereby lost profits, and has sustained damage to the amount of ..... dollars.

[Demand of Judgment.]

§ 1423. **Allegation where neither Time nor Place of Delivery was Fixed.**

Form No. 376.

That on the ..... day of ....., 18..., at ....., the plaintiff was ready and willing, and offered to receive and pay for said flour, and otherwise has duly performed all the conditions thereof on his part.

§ 1424. **Allegation where both Time and Place were Fixed.**

Form No. 377.

That the plaintiff was ready at the time and place appointed to receive said ....., and to pay for the same according to the agreement, and otherwise has duly performed all the conditions of the agreement on his part.

§ 1425. **Allegation where the Particular Time of Delivery was not Appointed.**

Form No. 378.

That on the ..... day of ....., 18..., at the place appointed, the plaintiff was ready to receive said ....., and pay for the same, according to the agreement, of which the defendant had notice, and the plaintiff has otherwise duly performed all the conditions thereof on his part.[1]

[1] On a contract to deliver "on or about" a certain day, the seller has a reasonable time after the day to deliver: Kipp v. Wiles, 3 Sandf. 585.

§ 1426. **Offer and Tender.**—In actions on a contract where neither time nor place of delivery was fixed, the plaintiff must aver an offer or tender of performance on his part,[1] and an offer to pay on delivery.[2] Where goods are to be delivered at one of two places, at the option of the seller, he is bound to give the buyer notice of the place selected.[3]

§ 1427. **Time.**—Where no time of payment and no time of delivery are agreed upon, payment and delivery are concurrent acts, and neither can maintain an action without showing a readiness and willingness to perform on his part.[4]

§ 1428. **Place.**—In actions on contracts in which both time and place were fixed, it is sufficient to aver a readiness at the place appointed to receive and to pay.[5] And such an averment is essential.[6]

§ 1429. **Tender on Demand.**—It need not be alleged that a tender was made upon demand. The plaintiff must allege that he was ready and willing to pay for the goods without a tender,[7] even where his obligation depends on an act of the defendant to be done at the same time.[8] Readiness to receive and to pay according to the terms of the agreement, and that defendant had notice of such readiness, is sufficient without tender.[9] It is sufficient to aver that he had been at all times ready to receive and to pay.[10]

§ 1430.—**Tender of Performance.**—A tender of performance will be necessary in contracts for the purchase of a thing at a future day named, and at a specified price, and an averment of readiness and willingness will not suffice.[11]

§ 1431. **Allegation of Part Payment.**

Form No. 379.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., it was mutually agreed between the plaintiff and the defendant that the defendant should sell and deliver to the plaintiff at ....., on or before the ..... day of ....., 18...,

[1] Lester v. Jewett, 1 Kern. 458.
[2] Smith v. Wright, 1 Abb. Pr. 243.
[3] Rogers v. Van Hoesen, 12 Johns. 221.
[4] Coler v. Livanston, 2 Cal. 51.
[5] Vail v. Rice, 5 N. Y. (1 Seld.) 155; Clarke v. Dales, 20 Barb. 42; and see Dunham v. Pettee, 8 N. Y. (4 Seld.) 508.
[6] Clarke v. Dales, 20 Barb. 42.
[7] Coonley v. Anderson, 1 Hill, 519; Vail v. Rice, 5 N. Y. (1 Seld.) 155; Bronson v. Wiman, 8 N. Y. 182; compare Chapin v. Potter, 1 Hilt. 366.
[8] White v. Demilt, 2 Hall. 436
[9] 2 Ch. Pl. 327; Rawson v. Johnson, 1 East, 203.
[10] Porter v. Rose, 12 Johns. 209.
[11] Lester v. Jewett, 11 N. Y. 453; Smith v. Wright, 1 Abb. Pr. 243; compare Coonley v. Anderson, 1 Hill, 519.

[describe the thing], and that the plaintiff should pay to the defendant therefor at the rate of ..... dollars per ... ., amounting to ..... dollars, payable as follows: ..... dollars at the time of making said agreement, and the residue on the delivery of the ....., as aforesaid.

II. That the plaintiff at the time of the contract paid to the defendant the sum of ..... dollars, in pursuance of the agreement.

III. That the plaintiff was ready and willing at the time and place aforesaid, to receive said goods and pay the balance therefor, of all which the defendant had notice; yet the said defendant hath not delivered the same or any part thereof; to plaintiff 's damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1432. **Payment.**—The giving of a promissory note, upon a purchase of goods, is not a sufficient payment to take the contract of sale out of the statute of frauds.[1] Part payment, to take the contract of sale out of the statute, must be made at the very time of making the contract. A payment the next day, though accepted on account, will not suffice.[2]

§ 1433. **Rescission by Vendor.**—To enable the vendor to rescind the sale, he must offer to return the notes given for the goods [3] If the contract be rescinded, the vendee is entitled to recover the money paid. If the contract is not rescinded, the vendees are entitled to possession on payment of the full amount due.[4] The party rescinding must put the other party in *statu quo*.[5] Where A. has made a payment in advance on a contract to purchase stock of B., which B. refuses or fails to deliver, and A. notifies B. that he claims the right to rescind the contract, and claims repayment of the money paid, the notice does not affect his right to maintain an action for damages on the contract.[6]

§ 1434. Against Seller of Stock, for Non-delivery.

Form No. 380.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff and defendant entered into an agreement subscribed by them, whereby it was mutually agreed between

[1] Ireland v. Johnson, 18 Abb. Pr. 392.
[2] Bissell v. Balcolm, 40 Barb. 98; Allen v. Aguira, 5 N. Y. Leg. Obs. 380.
[3] Coghill v. Boring, 15 Cal. 213.
[4] Miller v. Steen, 30 Cal. 407.
[5] Id.
[6] Jones v. Post, 6 Cal. 102.

them that the defendant should sell and deliver to the plaintiff, at such time within ..... days thereafter as the plaintiff should elect, ... shares of the capital stock of the ..... company, and that the plaintiff should pay him therefor ..... dollars.

II. That on the ..... day of ....., 18.., at ....., the plaintiff tendered to the defendant said sum of ..... dollars, and otherwise duly performed all the conditions of said agreement on his part, and demanded of the defendant that he deliver said ..... shares of stock to the plaintiff.

III. That the defendant has not delivered the same.

[Demand of Judgment.]

§ 1435. **Law of Place.**—If a contract for the sale and assignment of certificates of stock of a corporation is entered into in another State, but the certificates are afterwards delivered in this state, the legality of the sale and assignment is to be tested by the laws of this state.[1]

CHAPTER VIII.

FOR SALE OF REAL PROPERTY.

§ 1436. **Purchaser against Vendor, for Breach of Agreement to Convey.**

Form No. 331.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the plaintiff and defendant entered into an agreement, under their hands and seals, of which the following is a copy [insert copy of contract].

II. That on the ..... day of ....., 18.., the plaintiff demanded the conveyance of the said property from the defendant, and tendered [..... dollars] to the defendant [or was ready and willing, and offered to the defendant to pay ..... dollars, and duly to perform all his agreements under the said covenants, upon the like performance by the defendants].

III. That on the ..... day of ....., 18.., the plaintiff again demanded such conveyance [or that the defendant refused to execute the same].

[1] Dow v. Gould & Curry S. M. Co., 31 Cal. 629.

IV. That the defendant has not executed any conveyance of the said property to the plaintiff.

[Or, IV. That there is a mortgage upon the said property, made by ..... to ....., for ..... dollars, recorded in the office of ....., on the ..... day of ....., 18 .., and still unsatisfied of record; or any other defect of title.]

[DEMAND OF JUDGMENT.]

§ 1437. **Allegation of Possession.**—An allegation in a complaint that the plaintiff "assumed to and did exercise acts of control over and possession of portions" of a tract of land, is not equivalent to an averment that the plaintiff had actual possession of the tract of land, or any part of it.[1]

§ 1438. **Allegation of Seisin in Fee.**—An allegation that the plaintiff "is the owner" of the land sued for, is in substance an allegation of seisin in fee, in "ordinary" instead of in technical language.[2]

§ 1439. **Contract in the Alternative.**—When a contract is in the alternative, as to pay the purchase price or reconvey the property on a day named, the party who is to perform must make his election on the day named, and if he does not, he loses his right of election. He can not wait till the next day.[3]

§ 1440. **Demand and Refusal.**—It has been held to be necessary either to tender a deed for signature, or to wait a reasonable time for its preparation by the vendor, and make a second demand.[5] But if the vendor, on the first demand, positively refuse to convey, nothing more need be done.[5] An averment of demand and tender is necessary.[6]

§ 1441. **Description of Property.**—He who sells property on a description given by himself, is bound in equity to make good that description; and if it be erroneous in a material point, although the variance be occasioned by mistake, he must still remain liable for that variance.[7]

§ 1442. **Interpretation of Contract.**—In Iowa, the law will construe a contract to be a mortgage, rather than a conditional sale; still the intention of the parties to the contract is the true test.[8]

[1] Brennan v. Ford, 46 Cal. 7.
[2] Garwood v. Hastings, 38 Cal. 216.
[3] Rewrick v. Goldstone, 48 Cal. 554.
[4] Lutweller v. Linnell, 12 Barb. 512; Hacket v. Huson, 3 Wend. 250; Fuller v. Hubbard, 6 Cow. 17; see, however, Pearsoll v. Frazer, 14 Barb. 564, where it is asserted that the above rule is a rule of evidence merely, and need not be set forth specially. As to cases in which a demand is necessary, see Bruce v. Tilson, 25 N. Y. 194.
[5] Carpenter v. Brown, 6 Barb. 147; Driggs v. Dwight, 17 Wend. 74.
[6] Beecher v. Conradt, 13 N. Y. 110; Lester v. Jewett, 11 Id. 453.
[7] McFerran v. Taylor, 3 Cranch, 270.
[8] Hughes v. Sheaff, 19 Iowa, 335.

§ 1443. **Performance of Conditions.**—Where A. sold a lot of land to B. and delivered possession and in a written contract respecting the same it was stipulated, among other things, that in the event that B. should be dispossessed by legal judgment at any time within three years, A. should pay back to B. two thousand dollars; and should suit be brought against B. for the lot, then B. should notify A. of it, in order to enable him to assist in the defense of the title, it was held that the giving of the notice by B. to A. of the institution of suit against B. for the lot was indispensable to enable B. to recover of A. on such contract.[1] In a suit on such contract, B. should aver that he had been evicted after notice to A. The payment of the money is dependent on this fact.[2]

§ 1444. **Sale "in Writing."**—The party making an allegation in a pleading, that the sale of a mining claim under which he claims title, was in writing, is not thereby precluded from proving that the sale was a verbal one.[3]

§ 1445. **Writing, Presumption of.**—If a complaint avers that a contract was made for the sale of real estate, the presumption is that it was in writing.[4] A finding of fact in such case need not state that the contract was in writing.[5]

§ 1446. **Performance — Averment of Excuse for Non-performance.**

Form No. 382.

That on the .... day of ....., 18.., at ....., and before the time for performance had arrived, the defendant falsely and fraudulently represented to the plaintiff that he had sold said ..... to other persons; and that relying on said representation, and solely by reason thereof, the plaintiff was not prepared to receive and pay for the same, as he otherwise would have done.[6]

§ 1447. **The Same — For Damages for not Executing Conveyance, and for Repayment of Purchase Money.**

Form No. 383.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the plaintiff and defendant entered into an agreement under their hands and seals, of which the following is a copy [insert copy].

[1] Bensley v. Atwill, 12 Cal. 231.
[2] Id.
[3] Patterson v Keystone Mining Co., 30 Cal. 360.
[4] McDonald v. Mission View H. A., 51 Cal. 210.
[5] Id.
[6] Clarke v. Crandall, 27 Barb. 73.

[Or, I. That on the ..... day of..... 18.., at....., the defendant agreed with the plaintiff, that in consideration of the sum of ..... dollars, the receipt whereof was acknowledged by the defendant in said agreement, in part payment, and of the further sum of .... dollars, for which defendant agreed to take a note secured by a mortgage on the premises hereinafter described, said note and mortgage to be payable in one year from the ..... day of ....., 18.., and to bear interest at ten per cent per annum, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy from the defendant, the farm, then the residence of the defendant, in the town of....., county of ....., and state of ....., containing..... acres or thereabouts, for the sum of ..... dollars per acre, and that the defendant would, on the said ..... day of ..... 18.., at the ..... office, in ..... city, between the hours of ..... o'clock in the morning and .....o'clock in the evening, on receiving said note and mortgage, execute to the plaintiff a good and sufficient conveyance of the said premises, free from all incumbrances, and he further agreed to pay to this plaintiff, on failure of performance,..... dollars, liquidated damages. And the plaintiff agreed that he would, at the time and place above mentioned, on the execution of said conveyance, make, execute and deliver to the defendant the note and mortgage aforesaid.]

II. That on the ..... day of ....., 18.., at ..... [day and place agreed], the plaintiff demanded the conveyance of the said property from the defendant, and tendered to the defendant a note and mortgage made and executed pursuant to the agreement, and was ready and willing, and offered to the defendant, to make and execute the note and mortgage agreed on, and to deliver the same to the defendant, and duly to perform all his agreements under the said covenant, upon the like performance by the defendant, and otherwise has duly performed all the conditions of said agreement on his part.

III. That on the ..... day of ....., 18.., at ....., the plaintiff again demanded such conveyance [or that the defendant refused to execute the same].

IV. That the defendant has not executed any conveyance of the said property to the plaintiff, nor has he repaid to the plaintiff the said ..... dollars paid by this plaintiff to the defendant in part payment for said property.

[Demand of Judgment.]

§ 1448. **Vendor against Purchaser for Breach of Agreement to Purchase.**

Form No. 384.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., in the county of ....., and state of ....., the plaintiff and defendant entered into an agreement, under their hands and seals, of which the following is a copy [insert copy].

II. That on the ..... day of ....., 18..., at ....., the plaintiff was the owner in fee simple of the said property, and the same was free from all incumbrances, as was made to appear to the defendant, and at said time and place he tendered to the defendant a sufficient deed of conveyance of the same [or was ready and willing, and offered to convey the same to the defendant by a sufficient deed], on the payment by the defendant of the said sum.

III. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.]

§ 1449. **Admission.**—In *assumpsit* for the value of land conveyed by plaintiff to defendant, in consideration of an oral promise by the latter to convey other land worth two thousand dollars to the plaintiff, which promise defendant now refuses to perform; it was held that defendant's agreement, and the value of the land to have been conveyed to him, might be proved as an admission of the value of the land which he received.[1]

§ 1450. **Rescission of Contract.**—In order to rescind a contract for the sale of land, on the ground that the vendor can not perform it, having no title, it is necessary to aver and show an outstanding title in another.[2]

§ 1451. **Title.**—If the true owner conveys the property by any name, the conveyance as between the grantor and grantee will transfer the title.[3]

§ 1452. **Averment of Excuse for Non-performance.**

Form No. 385.

That on the ..... day of ....., 18..., and before the time for the plaintiff to perform the conditions thereof on his part, the defendant gave notice in writing to the plaintiff that he had determined not to take the land; and the defendant abandoned the agreement, and ever since wholly failed to perform it, to the plaintiff's damage ..... dollars.[4]

[1] Basset v. Basset, 55 Me. 127.
[2] Riddell v. Blake, 4 Cal. 264.
[3] Fallon v. Kehoe, 38 Cal. 44; citing Middleton v. Findla, 25 Cal. 80.
[4] North's Adm'r v. Pepper, 21 Wend. 636.

A refusal before the time specified, if relied on as an excuse for non-performance, must be alleged to have been addressed to the party alleging.[1]

§ 1453. **The Same — For not Fulfilling Agreement, and for Deficiency on Resale.**

Form No. 386

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff was the owner of four fifty-vara lots, situated in the western addition of the city and county of ....., to wit, lots 1, 2, 5, and 6, in block No. .....; that he put them up for sale at auction, at the auction rooms of C. D. & Co., No. ...., ... street, in the city of ....., on the .... day of ....., 18..., and announced before the commencement of the sale, as a part of the terms of sale, that ten per cent of the purchase money was, on the day of sale, to be paid by the purchaser to the auctioneers C. D. & Co., and that if any purchaser failed to make such payment, the lots would be resold, and the purchaser be charged with the deficiency.

II. That at the said sale A. B., the defendant, bid for and became the purchaser of each and all of the said lots, for the price of .... dollars, gold coin, for each lot.

III. That the said defendant did not, on the day of such sale or at any other time, pay ten per cent, or any part of the price bid, nor the purchase money, nor any part thereof.

IV. That in consequence of such neglect of payment, and after notice given to the defendant of the time and place when and where the said lots should be resold on his account, and that he would be charged with the deficiency, the said lots were put up to resale, and resold at the price of ..... dollars for each lot, making a deficiency of ..... dollars upon the said four lots.

V. That the defendant has not paid said deficiency.

[DEMAND OF JUDGMENT.]

§ 1454. **Rights of Vendee.**—When the property has been resold, the surplus beyond the purchase money due belongs to the vendee.[2]

§ 1455. **Vendor against Executor of Purchaser.**

Form No. 387.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the plaintiff and the said A. B. entered into a contract in writ-

[1] Traver v. Halstead, 23 Wend. 66. [2] Gouldin v. Buckelew, 4 Cal. 107.

ing, under their respective hands, of which the following is a copy [copy agreement].

II. That on the..... day of ....., 18.., at ....., the said A. B. died, leaving a last will and testament, by which he devised the said property as follows [set forth devise].

III. That the defendant was appointed by said will as the executor of said A. B., and by an order of the probate court of the county of ....., in this state, made on the ..... day of ....., 18.., said will was admitted to probate, and the defendant was then appointed and duly qualified as such executor.

IV. That on the ..... day of ....., 18.., the plaintiff offered to the defendant to convey the premises to him and the said [other devisees], and fully to perform said contract on his part, and requested the defendant to pay the money for the same, pursuant to the contract.

V. That the defendant then wholly refused to do so.

VI. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1456. **Vendor against Purchaser, for Real Property Contracted to be Sold, but not Conveyed.**

Form No. 388.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff [the house and lot No....., ... street], for ..... dollars. The following is a copy of said agreement [insert copy].

II. That on the ..... day of ....., 18.., at ....., the plaintiff tendered [or was ready and willing, and offered to execute] a sufficient deed of conveyance of the said property to the defendant, on payment of the said sum, and still is ready and willing to execute the same.

III. That the defendant has not paid the said sum, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1457. **Execute.**—"Execute" implies delivery.[1] It also implies subscription.[2] An allegation of readiness and willingness is necessary.[3]

[1] La Fayette Insurance Co. v. Rogers, 30 Barb. 491; Hook v. White, 36 Cal. 299.

[2] Cheney v. Cook, 7 Wis. 413.

[3] Beecher v. Conradt, 13 N. Y. 110.

CHAPTER IX.

UPON UNDERTAKINGS, BONDS, ETC.

§ 1458. **Short Form—On Undertakings Given in Actions.**

Form No. 589.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the defendant made an undertaking, a copy of which is hereto annexed as a part of this complaint, marked "Exhibit A."

II. That thereafter, at ....., judgment was duly given in the action therein mentioned against the [plaintiff] therein, for the sum of ..... dollars, no part whereof has been paid.

III. That on the ..... day of ....., an execution thereon against the property of ....., was issued to the sheriff of said county, which was, on the ..... day of ....., 18.., returned wholly unsatisfied.

[DEMAND OF JUDGMENT.]

[Annex copy of undertaking.]

§ 1459. **Action on Undertaking.**—If a provisional remedy has been allowed in an action, and the action be dismissed, or a judgment of nonsuit entered, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.[1] Upon a bail bond for the appearance of a person arrested in proceedings for contempt, if the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued, and the costs of the proceedings.[2] Upon any undertaking in attachment given in pursuance of section 540 or 555, Cal. Code C. P., suit may be commenced if an execution upon the judgment be returned unsatisfied, in whole or in part; or he may proceed, as in other cases, upon the return of an execution.

§ 1460. **Averments.**—In an action upon an undertaking given on appeal from the judgment of a district court for the possession of real estate, for costs and damages, and for the value of the use and occupation of the premises it is not necessary to aver in the complaint that the district court had juris-

[1] See Cal. Code C. P., sec. 581. [2] Cal. Code C. P., sec. 1220.

dition to render the judgment appealed from.[1] Nor is it necessary to allege that the undertaking had the effect to stay the execution of the judgment, if it appears therein that proceedings for the execution of the judgment were never taken.[2] If a copy of the undertaking be set out in the body of the complaint, it will be taken and considered as a part thereof.[3] A complaint, in such case, is not defective because it contains no averment that an execution had been issued and returned unsatisfied, or because no demand for payment is alleged to have been made on the principal.[4] Nor is it necessary to allege that the plaintiff in the judgment was entitled to the possession of the premises pending the appeal.[5] A complaint against the obligors in an undertaking given on an arrest under section 182, New York code, must show the recovery of a judgment in the action wherein it was given, by the defendant therein. An allegation of the discontinuance of such action is not sufficient.[6]

§ 1461. **Breaches and Damages.**—Taking all our statutes together, the obvious design was to put an undertaking on the same footing as a bond.[7] Special breaches should be assigned in all cases.[8] Where the condition of a bond is to pay the debt of another, the condition operates merely by way of defeasance. A bond should be sued on, setting out breaches and damages.[9] It is in general sufficient to allege the breach in the terms of the condition of the bond.[10] A declaration on a bond given to prosecute with effect a writ of replevin, where the breach assigned is, "that the suit was not prosecuted with effect, is sufficient.[11] The non-payment of a judgment obtained against the administrator may be assigned as a breach of the condition of such bond.[12]

§ 1462. **Conditions.**—Where the bond was not upon the record, and the complaint did not specify the conditions, it was held insufficient.[13]

§ 1463. **Construction.**—An undertaking on an attachment is an original, independent contract on the part of the sureties,

[1] Murdock v. Brooks, 38 Cal. 596.
[2] Id.
[3] Id.
[4] Id.
[5] Id.
[6] Moses v. Waterbury Button Co., 37 N. Y. Supr. (5 J. & Sp.) 393.
[7] Canfield v. Bates, 13 Cal. 606.
[8] Western B'k v. Sherwood, 29 Barb. 388.
[9] Baker v. Cornwall, 4 Cal. 15; Postmaster-general v. Cross, 4 Wash. C. Ct. 326.
[10] See Berger v. Williams, 4 McLean, 577.
[11] Gorman v. Lenox, Ex'rs., 15 Pet. 115.
[12] People v. Dunlap, 13 Johns. 437. See Frankel v. Stern, 44 Cal. 168, as to measure of damages.
[13] Woods v. Rainey, 15 Mo. 484.

and must be construed in connection with the statute which authorizes it.[1] If a word is omitted by mistake, and by looking at the whole undertaking and the statute it is apparent what word was intended to have been inserted, the omitted word may be supplied, and the contract read as if it had been expressed, without first reforming it by supplying the omitted word.[2]

§ 1464. **Consideration.**—Where it appears that the instrument was given in pursuance of a statute requirement, in a form prescribed thereby, and in a case within the statute, those facts constitute a sufficient consideration to support it, though it be without seal, and no further averment of consideration is necessary.[3] The complaint, by averring that it was sealed, imports a consideration; it is not necessary that it should also show that it was within the statute.[4] An undertaking executed by a sheriff before releasing property which he has ascertained to be exempt from execution, is void for want of consideration.[5]

§ 1465. **Defective Undertaking.**—If an undertaking has been executed to the defendant by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended.[6] Where a mere defective undertaking has been *bona fide* given, and the party will file a good one before the case is submitted, the court should permit him to do so.[7]

§ 1466. **Demand.**—Demand upon the principal is necessary.[8] But a demand upon the defendant is unnecessary.[9] But if a demand is necessary by the special terms of the undertaking, it should be averred.

§ 1467. **Description of Instrument.**—A complaint, in an action upon a statutory undertaking, which contains no other description of the instrument than an allegation that it corresponds with the provisions of a certain section of the practice act, is defective. The defect, however, being of form rather than of substance, objection to it must be taken by demurrer to the complaint.[10]

§ 1468. **Estoppel.**—In an action for use and occupation, upon an undertaking on appeal, the defendants are estopped from denying that the defendant in the judgment was in the possession at the time he took his appeal and gave the undertaking.[11]

[1] Frankel v. Stern, 44 Cal. 168.
[2] Id.
[3] Slack v. Heath, 4 E. D. Smith, 95; S. C., 1 Abb. Pr. 331.
[4] Clark v. Thorp, 2 Bosw. 680.
[5] Servanti v. Lusk, 43 Cal. 238.
[6] Morgan v. Thrift, 2 Cal. 563.
[7] Coulter v. Stark, 7 Cal. 244; Cunningham v. Hopkins, 8 Id. 83.
[8] Nelson v. Bostwick, 5 Hill, 37.
[9] Ernst v. Bartle, 1 Johns. Cas. 319.
[10] Mills v Gleason, 21 Cal. 274.
[11] Murdock v. Brooks, 38 Cal. 596.

§ 1469. **Execution Averred.**—If execution be issued in a county other than that where judgment was rendered, it may be averred as follows: That on, etc., a transcript of said judgment was duly filed in the office of the clerk of the . ..... court of the .... judicial district, in the county of ....., and on the same day an execution thereon was issued to the sheriff of said county, which has been returned wholly unsatisfied.

§ 1470. **Justification.**—In all cases where an undertaking with sureties, is required by the provisions of this code, the officer taking the same must require the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties.[1]

§ 1471. **On an Undertaking for Costs of Appeal.**

Form No. 390.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., judgment was rendered by the superior court of the county of ....., state aforesaid, in favor of the above-named plaintiffs, against one C. D. for the sum of ..... dollars; and that on the ..... day of ....., 18..., the said C. D. appealed to the supreme court of said state from the said judgment.

II. That upon said appeal the defendants made and filed with the clerk of said court, for the use of these plaintiffs, their written undertaking and justification therein, of which the following is a copy [copy undertaking].

III. That on the ..... day of ....., 18..., the judgment appealed from was by the said supreme court affirmed, and the sum of ..... dollars, costs and damages on the appeal, was awarded against the appellant.

IV. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1472. **Action by Assignee.**—To enable the assignee of a judgment to sue on the appeal bond, he must have an assign-

[1] Cal. Code C. P., sec. 1057.

ment of the bond.[1] An assignment which purports to transfer to the assignee all the right, title, and interest of the assignor in the undertaking, "and in the amount thereby secured," is broad enough to enable the assignee to recover for use and occupation pending the appeal, and costs.[2]

§ 1473. **Appeal Dismissed.**—Where an appeal is taken to the supreme court from a judgment by filing notice of appeal and undertaking, and the appeal is afterwards dismissed by the supreme court for failure of the appellant to send up a transcript, the sureties are liable on the undertaking on appeal.[3] Where an appeal is withdrawn or dismissed by consent of both parties, without being called to a final hearing, no action can be maintained on the appeal bond.[4] Where an appeal is dismissed on motion of respondent, based on written consent of the appellant, the dismissal operates as an affirmance of the judgment, and charges the sureties on the undertaking on appeal.[5]

§ 1474. **Delivery.**—In an action on an undertaking on appeal, it is a sufficient averment of the delivery of the undertaking if the complaint show that it was filed in the clerk's office.[6]

§ 1475. **Execution, Issue of.**—An averment in the complaint in a suit on an appeal bond that execution had been issued on the judgment and returned unsatisfied is unnecessary. The non-payment of the judgment can be shown without issuing an execution.[7]

§ 1476. **Frivolous Appeal.**—Damages for a frivolous appeal can not be recovered in an action upon the undertaking on appeal, unless they have been specially awarded by the appellate court.[8]

§ 1477. **Final Judgment.**—It need not be alleged that the judgment was final.[9]

§ 1478. **Judgment Reversed.**—Where an appeal bond was conditioned to pay the judgment appealed from, if the same should be affirmed, and it appeared that the judgment appealed from was reversed, the conditions of such bond were not broken, and no action would lie thereon.[10]

§ 1479. **Judgment Affirmed.**—Under the usual undertaking on appeal, if the judgment be affirmed, the liability of the

[1] Moses v. Thorne, 6 Cal. 87.
[2] Murdock v. Brooks, 38 Cal. 596.
[3] Ellis v. Hull, 23 Cal. 160.
[4] Osborn v. Hendrickson, 6 Cal. 175.
[5] Chase v. Beraud, 29 Cal. 138.
[6] Holmes v. Ohm, 23 Cal. 268.
[7] Tissot and Wife v. Darling, 9 Cal. 278.
[8] Hathaway v. Davis, 33 Cal. 161.
[9] Sutherland v. Phelps, 22 Ill. 91.
[10] Chase v. Ries, 10 Cal. 517.

surety accrues only after an affirmance upon that appeal of the then existing judgment. An interlocutory order of affirmance reserving leave to answer and litigate further, followed by new pleadings and a new judgment upon the new issue, does not render the sureties liable.[1] An undertaking or bond was construed to relate only to an action pending against the obligees at the time it was given.[2]

§ 1480. **Liability of Sureties.**—The sureties on an undertaking are entitled to stand on the precise terms of the contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves.[3] And a judgment against the principal is conclusive against the surety.[4] But an undertaking on appeal conditioned for the payment of what the judgment creditor has no legal right to receive, is not, as to such condition, binding upon the sureties.[5] The sureties on an appeal bond can not be sued until the judgment against their principal is in a condition to be enforced by execution.[6] So long as there is an order of court in force, staying execution on the judgment against a party who had appealed from a lower court, the sureties on the appeal bond can not be sued.[7]

§ 1481. **Made and Filed.**—The averment in the second allegation of the above form, that the defendants made and filed, etc., is sufficient.[8]

§ 1482. **Parties.**—Where defendant executed an undertaking on appeal to husband and wife, plaintiffs, an action on the undertaking may be maintained in the name of husband and wife.[9]

§ 1483. **Rights of Surety.**—Whenever any surety on an undertaking on appeal, executed to stay proceedings on a money judgment, pays the judgment, either with or without action after affirmation by the appellate courts, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same.[10]

§ 1484. **The Same—For Costs and Damages on an Arrest.**

Form No. 391.

[TITLE.]

The plaintiff complains, and alleges:

[1] Poppenhusen v. Seeley, 3 Keyes, 150.
[2] Beach v. Endress, 51 Barb. 570.
[3] Tarpey v. Schillenberger, 10 Cal. 390.
[4] Pico v. Webster, 14 Cal. 202.
[5] Whitney v. Allen, 21 Cal. 233
[6] Parnell v. Hancock, 48 Cal. 452.
[7] Id.
[8] Gibbons v. Berhard, 3 Bosw. 635; but compare Pevey v. Sleight, 1 Wend. 518.
[9] Tissot v. Darling, 9 Cal. 278.
[10] Cal. Code C. P., sec. 1059.

I. That heretofore an action was commenced in the superior court of the county of ....., state aforesaid [or otherwise state the court], against this plaintiff, wherein the said A. B. made application to the Hon. C. D., judge of said court, for an order of arrest against this plaintiff, whereupon the defendants, on the ..... day of ....., 18 ..., at ....., executed and filed with the clerk of said court, for the benefit of this plaintiff, pursuant to law, a written undertaking, of which the following is a copy [copy undertaking].

II. That thereupon, pursuant to said application and undertaking, an order was made by the judge of said court for the arrest of this plaintiff, and thereby the said A. B. required the sheriff of ..... county to arrest this plaintiff, and hold him to bail in the sum of ..... dollars.

III. That this plaintiff was, on the ..... day of ....., 18 ..., arrested by the sheriff of the ....., under said order, and was unjustly detained and deprived of his liberty thereunder for the space of .... days, to his damage ..... dollars.

IV. That such proceedings were afterwards had in said action that this plaintiff, on the .... day of ....., 18 .., recovered a judgment therein, which was rendered by said court against the defendant, A. B., for ..... dollars.

V. That on the ..... day of ....., 18 .., at ....., this plaintiff demanded payment of said judgment and damages from the defendant.

VI. That he has not paid the same, nor any part thereof.

[Demand of Judgment.]

§ 1485. On an Undertaking, on Release from Arrest.

Form No. 392.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 .., at....., under an order of arrest duly granted by A. B., a judge of the ..... court, against one C. D., in an action brought in the said court by the plaintiff herein against the said C. D., the said C. D. was arrested by the sheriff of the county of .....

II. That on the ..... day of ....., 18 .., at ....., the defendants undertook, in the sum of ..... dollars, that the said C. D. should, if released, render himself at all times amenable to the process of the court during the pendency of the said action, and to such as might be issued to enforce the judgment therein, a copy of which undertaking is hereto annexed, marked "Exhibit A."

III. That thereupon the said C. D. was released.

IV. That on the .... day of ....., 18..., judgment was rendered for the plaintiff in the said action, for ..... dollars.

V. That on the ..... day of ....., 18..., execution was issued against the property of the said C. D., under the said judgment, but the sheriff has made return that no property was found.

VI. That on the ..... day of ....., 18..., execution was issued against the person of the said C. D., under the said judgment, but the sheriff has made return that he could not be found.

VII. That the said judgment has not been paid, nor any part thereof.

[Demand of Judgment.]

[Annex copy of undertaking, marked "Exhibit A."]

§ 1486. **Attachments.**—On a bond given to an officer to be relieved from arrest, on an attachment conditioned to appear at the return day, an allegation of non-appearance is sufficient.[1] On an attachment for a contempt the complaint must state plaintiff's connection with the attachment proceedings, and to what extent he was aggrieved by the acts of defendant.[2] That the order for the attachment was duly granted is sufficient [3]

§ 1487. **Essential Averment.**—A complaint on a recognizance in a criminal case should aver that the same was filed in or became a matter of record in the court where it was returnable.[4]

§ 1488. **Execution must be Averred.**—In an action upon an undertaking given to procure a discharge from arrest, the complaint is bad upon demurrer if it omits to aver the issuing and return of an execution against the property of the debtor arrested, and also the issuing and return of an execution against the person.[5] Execution against property need not be averred.[6]

§ 1489. **Execution against the Person.**—The averment of the recovery of the judgment, and proceedings thereupon had supplementary to execution, and the issuance of attachment for contempt, under which the instrument sued upon was executed, is sufficient.[7]

[1] Thomas v. Cameron, 17 Wend. 59; Hart v. Seixas, 21 Id. 40.

[2] Raynor v. Clark, 7 Barb. 581.

[3] Code C. P. 456.

[4] Mendocino County v. Lamar, 30 Cal. 627.

[5] Gauntley v. Wheeler, 31 How. Pr. 137.

[6] Renick v. Orser, 4 Bosw. 384; Gregory v. Levy, 12 Barb. 610.

[7] Kelly v. McCormick, 2 E. D. Smith, 503.

§ 1490. **Indictment Found.**—Where a bail bond is given to appear and answer an indictment, the complaint must aver that the indictment was found or is pending.[1]

§ 1491. **Recognizance.**—In an action in the district court upon a recognizance of bail given under order of the county judge for the release of a party charged with larceny, the complaint need not aver that the recognizance was certified by the court of sessions to the district court, nor that the principal has not satisfied the judgment of forfeiture. The authorities that such certificate and averment are necessary refer to proceedings by *scire facias* upon a record of the recognizance to which the accused is a party.[2] The complaint alleged substantially that G. was indicted for gaming and arrested, and the defendant executed the recognizance which is set out; that G. appeared at the first term of the court thereafter and pleaded not guilty, and case continued to next term, at which time, the case being called for trial, G. did not appear, and the defendants, though "called," did not produce his body; that the court then made an order forfeiting the recognizance, and that the defendants did not produce the body of G. before the final adjournment of the court. Such a complaint states a cause of action.[3]

§ 1492. **On an Undertaking for Costs and Damages on Attachment.**

Form No. 393.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore an action was commenced in this court by the defendant A. B., for the recovery of money, against this plaintiff, wherein the said A. B. made application to the clerk of the said court for a writ of attachment against the property of this plaintiff, whereupon the defendant, on the ..... day of ....., 18..., at ....., executed and filed with the clerk of said court, for the benefit of this plaintiff, pursuant to section five hundred and thirty-nine of the code of civil procedure, a written undertaking, of which the following is a copy [copy of the undertaking].

II. That pursuant to said application and undertaking, the clerk of said court issued a writ of attachment, directed to the sheriff of said county, whereby the said sheriff was required to attach and safely keep sufficient property of this plaintiff to satisfy the demand of the said A. B. in said action, to wit, the sum of ..... dollars, together with costs and expenses.

[1] People v. Smith, 3 Cal. 271. [2] People v. Love, 19 Cal. 676.
[3] People v. Smith, 18 Cal. 498.

III That at the time of the issuing of said attachment, this plaintiff was engaged as a merchant in selling hardware at wholesale, at No. ....., ... street, in the city of ....., in said county; that the sheriff of said county, pursuant to said writ of attachment, entered said store and removed the property of this plaintiff, and thereby the business of this plaintiff was utterly broken up, and the goods attached became unmarketable and useless, and this plaintiff's credit became thereby greatly injured, to his damage ..... dollars.

IV. That such proceedings were had in the suit aforesaid that this plaintiff, on the ..... day of ....., 18.., recovered judgment therein, which was rendered by said court against the said A. B., plaintiff therein, for the sum of ..... dollars, his costs of defending said action.

V. That on the ..... day of ....., 18.., at ....., this plaintiff demanded payment of the said judgment from said A. B.

VI. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1493. **Principal and Surety.**—Where the surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety.[1]

§ 1494. **Statute, how Pleaded.**—Reference to statute, as in the above form, is sufficient. The court is bound to take notice of a public statute.[2]

§ 1495. **On an Undertaking Given to Procure the Discharge of an Attachment.**

Form No. 394.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the .... day of ....., 18.., an attachment against the property of C. D. was issued out of the ..... court, by the clerk thereof, in an action commenced by A. B., the plaintiff herein, agianst the said C. D., the defendant herein, to recover [state what].

II. That afterwards, on the .... day of ....., 18.., at ....., the said C. D. appeared in said action, and applied for a discharge of said attachment, and that the defendants herein, E. F. and G. H., thereupon executed and delivered to this plaintiff a written undertaking pursuant to law, a copy of

[1] Pico v. Webster, 14 Cal. 202.
[2] Goelet v. Cowdrey, 1 Duer, 132; Shaw v. Tobias, 3 Comst. 188.

which is hereto annexed and made a part of this complaint, marked "Exhibit A."

III. That upon delivery of said undertaking the said attachment was discharged and the property was released, and that subsequently, on the .... day of ....., 18..., said plaintiff recovered judgment against the said C. D., which was rendered in said action, for ..... dollars, damages and costs, which judgment was entered and docketed in the office of the clerk of ..... county, on the ..... day of ....., 18..., and that said judgment has not been paid.

IV. That on the .... day of ....., 18..., this plaintiff demanded of the defendants herein payment of said judgment, which was by each and all of them refused.

V. That they have not paid the same, nor any part thereof.

[Demand of Judgment.]

[Annex copy of undertaking, marked "Exhibit A."][1]

§ 1496. **Consideration.**—Where defendant applies to the court for a discharge of the attachment, and an undertaking is executed by D. & R., reciting the fact of the attachment, and that "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the court makes an order discharging the writ and releasing the property; in suit against the sureties on the undertaking, the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release in consequence and in consideration of the undertaking, by order of the court, which is set out, the actual release and redelivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made[2]. The recitals in statutory undertakings given in such cases have the same effect and are to be construed in the same way as bonds making the same recitals, and are conclusive of the facts stated.[3] And a complaint in an action on an undertaking given under section 540 of the code of civil procedure of California, which alleges that the same was given to release certain property taken under attachment, is sustained by proof of an undertaking which recites that the same was given to prevent a levy.[4]

[1] For a form of complaint in such cases, consult Cruyt v. Phillips, 7 Abb. Pr. 205.

[2] McMillan v. Dana, 18 Cal. 339.

[3] McMillan v. Dana, 18 Cal. 339.

[4] McNamara v. Hammersly, 1 West Coast Rep. 560; McCutcheon v. Weston, Id. 850.

§ 1497. **Averments—Issue of Attachment.**—It need not be alleged that the attachment was duly issued, if it be shown that it was issued from a court of general jurisdiction.[1] And reciting the fact of a levy of the writ, the complaint need not aver or set out the facts which authorized the issuing of the attachment. The recital of the levy estops defendants from denying it, and the levy is sufficient without averment of the previous proceedings.[2]

§ 1498. **Released upon Delivery.**—The complaint should allege that the property attached was released upon the delivery of the undertaking.[3] A failure to do so is fatal, and the defect may be taken advantage of by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action.[4] It is necessary also to state the consideration of the undertaking; a mere reference to the condition of the bond itself is insufficient.[5]

§ 1499. **On an Undertaking Given in Claim and Delivery.**

Form No. 395.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore this plaintiff commenced an action in the ..... court, against A. B., to recover possession of specific personal property.

II. That in the course of said action such proceedings of claim and delivery under and pursuant to the statute were had, that on the .. .. day of ....., 18.., the defendants made and delivered to the sheriff for the use of this plaintiff, pursuant to the statute, their written undertaking, of which the following is a copy [copy of the undertaking].

III. That the personal property referred to in said undertaking was delivered [or released] to the said A. B., defendant in said action, pursuant to said undertaking, and to a requisition of said A. B., defendant in said action, made pursuant to law, and said undertaking was thereupon delivered to this plaintiff.

IV. That such proceedings were afterwards had, that on the ..... day of ....., 18.., a verdict in the superior court of the county of ..... was rendered against the said A. B., wherein the value of the said property was found to be ..... dollars, whereupon judgment was rendered against A. B., the

[1] Court v. Phillips, 7 Abb. Pr. 205.
[2] McMillan v. Dana, 18 Cal. 339; Gregory v. Levy, 12 Barb. 610.
[3] Williamson v. Blattan, 9 Cal. 500.
[4] Id.
[5] Palmer v. Melvin, 6 Cal. 651.

defendant therein, that the plaintiff recover possession of said property, or the sum of ..... dollars, in case a delivery could not be had.

V. That the defendant has not returned said property, nor otherwise paid or satisfied said judgment.

VI. [State demand, where that is necessary.]

VII. That this plaintiff thereafter caused execution to be issued on said jungment against the said defendant, A. B., which execution has been returned wholly unsatisfied.

VIII. That the defendant has not paid said judgment, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 1500. **Action by Assignee.**—In an action by the assignee of an undertaking given in proceedings of claim and delivery, it is sufficient, by way of showing plaintiff's title, to allege that the undertaking was duly assigned, etc., to him, without alleging that the judgment in the action was also assigned.[1] When the action is brought by the assignees of only a portion of the promisees, there is a defect of parties; all the promisees should be represented.[2] Where a replevin bond substantially conforms to the act, the assignee of the defendants can maintain an action upon it.[3]

§ 1501. **Consideration.**—The averment of delivery and release is an averment of consideration, and must be stated, even if the undertaking was under seal.[4] But if the undertaking recites the performance of the condition, a complaint setting forth the undertaking need not also aver performance.[5]

§ 1502. **Delivery and Release.**—It must be averred that the property was delivered or released.[6]

§ 1503. **Demand.**—No demand need be averred where judgment was returned unsatisfied.[7]

§ 1504. **Facts Authorizing Issue of Process.**—The complaint need not aver that it was taken in pursuance of the statute. It is enough that the instrument set forth is in accordance with the statute.[8]

§ 1505. **Interest Awarded.**—Upon an undertaking given in an action of claim and delivery, for the payment of a fixed

[1] Morange v. Mudge, 6 Abb. Pr. 243.

[2] Bowdoin v. Coleman, 6 Duer, 182; 3 Abb. Pr. 431.

[3] Wingate v. Brooks, 3 Cal. 112.

[4] Nickerson v. Chatterton, 7 Cal. 568.

[5] McMillan v. Dana, 18 Cal. 339.

[6] Palmer v. Melvin, 6 Cal. 651; Williamson v. Blattan, 9 Id. 500.

[7] Bowdoin v. Coleman, 3 Abb. Pr. 431; Slack v. Heath, 1 Id. 331.

[8] McMillan v. Dana, 18 Cal. 339; Shaw v. Tobias, 3 N. Y. 188; Gregory v. Levy, 12 Barb. 610.

sum, and not conditioned for the return of the goods, interest may be awarded upon the amount of the penalty from the date of judgment in the original action; because after the recovery the sureties are in default, and the neglect to pay puts them in the wrong.[1]

§ 1506. **Joint Bond.**—No recovery can be had on a bond purporting to be a joint bond of the principal and sureties, but signed by the latter only.[2] Otherwise, as to undertakings under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal.[3]

§ 1507. **Judgment in the Alternative.**—The complaint should show that judgment was rendered in the alternative.[4] It must be averred that neither had the property been returned nor the specified value thereof, as fixed by the judgment in the original suit paid.[5]

§ 1508. **Liability of Sureties.**—Where the plaintiff, in replevin gives the statutory undertaking, and takes possession of the property in suit, and is afterwards nonsuited, and judgment entered against him for the return of the property and for costs, his sureties are liable for damages sustained by defendant, by reason of a failure to return the goods, but not for damages for the original taking and detention—the value of the goods not having been found by the jury.[6] If an undertaking in an action in replevin commenced in a justice's court limits the liability of the persons who execute it to a judgment for the return of the property rendered by the justice, and such judgment is not rendered in the justice's court, a recovery can not be had upon the undertaking, even if, on appeal, such judgment is rendered by the county court.[7] Otherwise, if the statutory form of the undertaking is followed.[8] A judgment in favor of the defendant which does not award him a return of the property, does not impose any liability upon the sureties.[9]

§ 1509. **Reference to Section of Act.**—A complaint upon an undertaking given under the provisions of a statute, which contains no other description of the instrument than an allegation that it corresponds with the provisions of such statute, is defective.[10] The material portions of the undertaking should be

[1] Emerson v. Booth, 51 Barb. 40.
[2] City of Sacramento v. Dunlap 14 Cal. 421.
[3] Id.
[4] Nickerson v. Chatterson, 7 Cal. 568.
[5] Id.
[6] Ginica v. Atwood, 8 Cal. 446.
[7] Mitchum v. Stanton, 49 Cal. 302.
[8] Id.
[9] Id.
[10] Mills v. Gleason, 21 Cal. 274.

set forth; but it will be at most only a defect of form, and objection must be taken by demurrer.[1]

§ 1510. **Value of Property.**—The complaint does not state facts sufficient to constitute a cause of action, unless it aver that the value of the property was found by the jury, and that an alternative judgment was rendered.[2]

§ 1511. **On an Undertaking Given in Injunction.**

Form No. 396.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18 .., in an action brought by C. D. against this plaintiff, an injunction issued out of this court, was served on this plaintiff, enjoining him from [state effect of the injunction].

II. That upon the issuing of the said injunction, the defendants gave an undertaking required by section five hundred and twenty-nine of the code of civil procedure [or by law], of which the following is a copy [copy of undertaking].

III. That such proceedings were had in the said action that it was finally decided by the court, and thereby adjudged, that the said C. D. was not entitled to the said injunction.

IV. That the damages sustained by this plaintiff, by reason of the said injunction, amounted to the sum of ..... dollars, and interest thereon from the ..... day of ....., which the court on that day awarded to this plaintiff.

V. That no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 1512. **Damages.**—Where an officer is enjoined from paying over money in his hands, legal interest only can be recovered as damages for its detention, in an action on the injunction bond.[3] To recover damages for the wrongful issuing of the writ, it was held that the amount paid to counsel as a fee to procure the dissolution of the injunction was properly allowed as part of the damages.[4] So held also when an order to show cause why an injunction should not issue was made, though the fee was paid after the return of the order to show cause, provided the retainer was before that date.[5]

[1] Mills v. Gleason, 21 Cal. 274. As to manner of pleading in such cases, consult Bowdoin v. Coleman, 3 Abb. Pr. 431; Slack v. Heath, 1 Id. 331; Rayner v. Clark, 7 Barb. 581; Loomis v. Brown, 16 Id. 325; Gregory v. Levy, 12 Id. 610; Gould v. Warner, 3 Wend. 54; Phillips v. Price, 3 Mau. & S. 180; Page v. Eamer, 1 Bos. & P. 381, n.

[2] Clary v. Rolland, 24 Cal. 147.

[3] Lally v. Wise, 28 Cal. 539.

[4] Ah Thaie v. Quan Wau et al., 8 Cal. 216.

[5] Prader v. Grim, 13 Cal. 585.

§ 1513. **Damages must be Averred.**—In the action against the sureties on an injunction bond, the condition of which is that the plaintiffs in the suit for whom the sureties undertook should pay all damages and costs that should be awarded against the plaintiff by virtue of the issuing of said injunction by any competent court, and the complaint did not aver that any damages had been awarded, it held that such complaint is fatally defective.[1]

§ 1514. **Enjoining Payment of Money.**—M., a sheriff, had in his hands money belonging to L., which he had collected, on an execution in favor of L. & D., against S. W. & C. commenced an action against M. & L., and others to enjoin M. from paying the money to L., and procured a preliminary injunction, which was served on M. alone, but L. appeared in the action and defended. The injunction bond ran to all the defendants. It was held that L. could maintain an action for damages on the injunction bond.[2]

§ 1515. **Obedience to Injunction.**—Mere obedience upon notice of issuance of injunction is sufficient, if alleged.[3]

§ 1516. **Service of Injunction.**—An allegation that injunction was served imports a legal service.[4]

§ 1517. **Statement of Trial on Injunction.**—It is sufficient to allege that an injunction was granted by a court or judge, that issues were joined and judgment rendered.[5]

§ 1518. **Who may Join.**—All obligees on an injunction bond may join as plaintiffs, whether their several claims be similar or not.[6]

§ 1519. **On a Bond or Undertaking, Condition only Set Forth.**

Form No. 397.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ..... 18.., the defendant covenanted with the plaintiff, under his hand and seal to pay to the plaintiff the sum of [state the penalty].

II. That said obligation was upon the express condition thereunder written, that if, etc. [set forth the words of the condition], the said obligation was to be void, otherwise to remain in full force.

III. [Allege breaches as in other cases.]

[DEMAND OF JUDGMENT.]

[1] Tarpey v. Shillenberger, 10 Cal. 390.
[2] Lally v. Wise, 28 Cal. 539.
[3] Cumberland Coal and Iron Co. v. Hoffman Steam Coal Co., 15 Abb. Pr. 78.
[4] Loomis v. Brown, 16 Barb. 325.
[5] Id.
[6] Id.

§ 1520. **Breach of Condition—The Basis of the Action.** The breach of the conditions of a penal bond constitutes, in fact, the basis of the plaintiff's action, and it should be assigned with certainty and particularity, so as to show the injury.[1] In general, it is sufficient to allege the breach in the terms of the condition of the bond.[2]

§ 1521. **Notice.**—Notice to the representative and a demand upon him are not always essential.[3] It is not necessary to aver notice to the sureties, nor to state who was the applicant for the order for prosecution.[4]

§ 1522. **Parties.**—In an action on a bond or written undertaking, there can be no constructive parties jointly liable with the proper obligors.[5]

§ 1523. **Penal Bonds.**—In actions on penal bonds, the complaint must specifically assign the breaches for which the action is brought;[6] thus, on a bond conditioned that a party shall pay on a certain contingency or on demand, or for an uncertain sum, breaches must be assigned.[7] Also a bond given on a plea of a title before a justice.[8] But not a bond payable in money by installments.[9] Nor to bonds payable in money only, which may be brought under actions on written instruments.

§ 1524. **On Arbitration Bond—Refusal to Comply with Award.**

Form No. 393.

[TITLE.]

The plaintiff complains, and alleges:

I. That in consideration of certain questions in difference between plaintiff and defendant, and of a certain bond executed by this plaintiff to the defendant, the defendant, on the .... day of ....., 18..., at ....., made and delivered to the plaintiff an undertaking, conditioned to abide the award of ..... upon said question of difference; a copy of which undertaking is hereto annexed, marked "Exhibit A."

II. That said ..... undertook the arbitration thereof on the .... day of ....., 18..., at ..... , and duly published their award in writing upon the matter submitted, and delivered

[1] Campbell v. Strong, Hempst. 265; Dixon v. United States, 1 Brock. 177; Postmaster-general v. Cross, 4 Wash. C. Ct. 326.

[2] Berger v. Williams, 4 McLean, 577; Gorman v. Lenox, 15 Pet 115.

[3] People v. Rowland, 5 Barb. 449.

[4] People v. Falconer, 2 Sandf. 81.

[5] Lindsay v. Flint, 4 Cal. 88.

[6] Baker v. Cornwall, 4 Cal. 15; Munro v. Alaire, 2 Cai. 319; Ramsey v. Matthews, 1 Bibb. 242; Burnett v. Wylie, Hempst. 197; and see Hazel v. Waters, 3 Cranch C. Ct. 682; Western Bank v. Sherwood, 29 Barb. 383.

[7] Nelson v. Bostwick, 5 Hill, 37.

[8] Patterson v. Parker, 2 Hill, 598.

[9] Harmon v. Dedrick, 3 Barb. 192; Spaulding v. Millard, 17 Wend. 331.

the same to the parties, and thereby awarded that the defendant should [state terms of the award], a copy of which award is hereto annexed as a part of this complaint, marked "Exhibit B."

III. That the plaintiff duly performed all the conditions of said bond and of said award on his part.

IV. That on the .... day of ....., 18..., notice of said award was given to the defendant.

V. That the defendant has not [state the breach].

[DEMAND OF JUDGMENT.]

[Annex copies of Exhibits "A" and "B".][1]

§ 1525. **Award of Payment at a Future Day.**—Where the award directs payment at a future day, and, pursuant to authority given in the submission, requires the debtor to give security for its payment, an action lies upon the arbitration bond, upon the refusal to give security, without waiting till the time of payment.[2]

§ 1526. **Assignment of Breach for Revoking Arbitrator's Power.**

Form No. 399.

That thereafter, and before the matters aforesaid were finally passed upon by said arbitrator, the defendants, by writing under their hands and seals, delivered to ...., revoked the powers of the arbitrators, and notified said ..... that they would not abide by the award of said arbitration.[3]

§ 1527. **On a Bond for the Faithful Accounting of an Agent.**

Form No. 400.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., it was agreed between this plaintiff and one A. B., that the said A. B. should solicit and collect subscriptions for a [state what], and that the plaintiff should pay to the said A. B. [state terms of payment] for such service, and that the said A. B. should faithfully account to this plaintiff for all [property] intrusted to him, and should faithfully pay over all moneys collected by him under authority of said agreement.

II. That in consideration of said agreement, the defendant

[1] For authorities upon forms of complaints in such actions, see Myers v. Dixon, 2 Hall, 456; M'Kinstry v. Solomons, 2 Johns. 57; S. C., 13 Id. 27.

[2] Bayne v. Morris, 1 Wall. 97.

[3] Where the defendant revoked the arbitrator's powers before the submission was actually made a rule of court, the plaintiff should assign the revocation as a breach—not the nonperformance of the award: Frets v. Frets, 1 Cow. 385; William v. Maden, 9 Wend. 240.

made and delivered to the plaintiff an undertaking in writing, under his hand and seal, conditioned to the faithful performance by said A. B of the terms of said agreement on his part; a copy of which undertaking is hereto annexed, marked "Exhibit A."

III. That thereafter the said A. B. did solicit, collect, and receive divers sums of money, in the course of his employment under the aforesaid agreement, which sums he has failed to render up, account for, or pay over to the plaintiff.

IV. That on the .....day of ....., 18.., at ....., the plaintiff requested the said A. B. to account for and pay over to the plaintiff such sums, and thereupon demanded payment from him of the same, according to the terms of said undertaking.

V. That no part thereof has been paid.

[DEMAND OF JUDGMENT.]

[Annex copy of "Exhibit A."]

§ 1528. **Essential Averments—Request—Sale and Accounting.**—Request is a condition precedent in a bond to account on request,[1] and a sale must be averred, with a refusal to account therefor.[2]

§ 1529. **On a Bond for the Fidelity of a Clerk.**

Form No. 401.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at....., the plaintiff being then about to employ one A. B. as a clerk, the defendant covenanted with the plaintiff, under his hand and seal, that if the said A. B. should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt, or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding..... dollars.

II. That between the ..... day of ....., 18.., and the ..... day of ....., 18.., the said A. B. received moneys and other property, amounting to the value of ..... dollars, for the use of the plaintiff, for which he has not accounted to him.

[DEMAND OF JUDGMENT.]

§ 1530. **Application of Bond.**—Such a bond applies to the honesty of the clerk, and not to his ability, and the sureties are

[1] Davis v. Cary, 15 Q. B. 418; S. C., 69 Eng. Com. L. 416.
[2] Wolfe v. Luyster, 1 Hall, 161.

not responsible for loss arising from a mere mistake;[1] unless the clerk conceals deficiencies, and for this purpose makes false entries in the books.[2]

§ 1531. **Consideration.**—Appointment to office and its emoluments is a sufficient consideration to support the obligation of sureties for fidelity.[3]

§ 1532. **Faithful Discharge of Duties.**—In a suit on a bond to secure faithful performance of various duties of secretary and treasurer to a private association, if the defendant who was a surety (the principal being dead), craved oyer of the bond and conditions, and pleaded general performance, it is sufficient.[4] Where an inhabitant of a town acted as justice of the peace, and gave a bond with sureties for the faithful discharge of his duties as justice, the fact that no law required him to give bond would not affect the validity of the instrument as a common-law obligation.[5]

§ 1533. **On an Official Bond.**

Form No. 402.

[Title.]

The plaintiff complains, and alleges:

I. That the defendant, on the ..... day of ....., 18..., at .. .., made and delivered his bond or writing obligatory, sealed with his seal, of which the following is a copy [copy bond].

II. [Set forth breach.]

[Demand of Judgment.]

§ 1534. **Allegation of Breach—For Neglect of Sheriff to Levy.**

Form No. 403.

That said sheriff did not execute said process, but although there was then within his county real and personal property of which he might have levied the moneys thereby directed to be levied, he neglected and refused so to do, whereby the plaintiff lost his said debt.

§ 1535. **Allegation of Breach—For Neglect to Sell after Levy.**

Form No. 404.

That the said sheriff by virtue thereof on the ..... day of ....., levied on the goods of said A. B., of the value of ..... dollars; but he neglected to advertise and sell the goods so levied on by him as aforesaid, and no part of the

[1] Union Bank v. Clossey, 10 Johns. 271.

[2] Id.

[3] United States v. Linn, 15 Pet. 290.

[4] Jackson v. Rundlet, 1 Woodb. & M. 381.

[5] Williamson v. Woolf, 37 Ala. 208.

moneys directed to be collected on the relator's said execution has been received by the relator.[1]

§ 1536. **Allegation of Breach—For Neglect to Return.**

Form No. 405.

Who by virtue thereof, on the .... day of ....., levied on the goods of said A. B., of the value of ..... dollars; but although more than sixty days elapsed after its delivery to him and before this action, wholly neglected and failed to make return of said execution, and no part of the moneys directed to be collected thereby has been received by the relator.

§ 1537. **Allegation of Breach of Treasurer's Bond.**

Form No. 406.

That said treasurer between the .... day of ....., and the ....day of ....., received various sums of money, as such treasurer, amounting to about the sum of ..... dollars [being a part of the tax raised in his county for the year .....], and that he fraudulently and in breach of his trust converted and appropriated to his own use said sum.[2]

§ 1538. **Bond—Official.**—In an action upon a sheriff's bond, the declaration did not charge the sheriff with the breach of his duty in the execution of any writ or process in which the real plaintiff was personally interested; but with a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury from the unlawful violence of a mob, it was held, on motion in arrest of judgment, that the declaration did not show a cause of action.[3]

§ 1539. **Breach must be Assigned.**—In a declaration upon a covenant for general performance of duty, if no breach be assigned, or a breach which is bad, as not being, in point of law, within the scope of the covenant, the defect is fatal, even after verdict.[4] Where, in an action upon a sheriff's bond, the declaration did not charge the sheriff with a breach of his duty in the execution of any writ or process in which the real plaintiff was personally interested, but with a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury from the un awful violence

[1] People v. Ten Eyck, 13 Wend. 448. This f rm may be used where writ was delivered to the deputy. See § 1543.

[2] Where the condition of a treasurer's bond was that he "should keep a separate account in the bank of A., as such treasurer, of all moneys," etc., it was held that a breach might be assigned by negativing the words of the condition, though only nominal damages could be recovered under it: Albany Dutch Church v. Vedder, 14 Wend. 165.

[3] South v. Maryland, 18 How. U. S. 396

[4] Minor v. Merchant's Bank of Alexandria, 1 Pet. 46, 67; compare Snow v. Johnson, 1 Minn. 48.

of a mob; the declaration did not set forth a sufficient cause of action against the sheriff and his sureties.[1]

§ 1540. **Change of Parties on Bond.**—Where the principal causes his name to be stricken from a bond without their knowledge or consent, it is void as against the sureties.[2] But the name of an obligor may be erased and a new obligor inserted by consent, of all parties, without making the bond void.[3]

§ 1541. **Collector's Bond.**—The district attorney of a county has the authority, of his own volition, with or without instructions from the controller of state, county court, or the board of supervisors of a county, to bring an action upon the official bond of the tax collector of a county.[4] In an action of covenant brought on a penal bond given to account for public moneys, if the breach assigned is the non-performance of the condition, the count will be adjudged bad on demurrer. The breach assigned must be the non-payment of the penalty.[5] All the money due on a tax collector's bond may be recovered in a single action in the name of the people of the state, although part of the money thus due may belong to the county and part to the state.[6] The complaint in an action on a tax collector's bond need not aver that the taxes charged on the assessment roll were legally assessed.[7] The securities on the official bond of a sheriff and *ex officio* collector of the revenue are liable for an act of the latter in collecting an assessment of taxes on property not subject to taxation.[8]

§ 1542. **Constable.**—An action on the official bond of a constable lies primarily upon breach of the condition of the bond, whether the injury for which suit is brought be a trespass or not, the result of the non-feasance or misfeasance of the officer.[9] In an action against sureties on a constable's bond, in addition to the allegation that the officer did not levy the amount of an execution, to take the body of the defendant, it must be alleged that the defendant had property which might have been levied upon, or that his body could have been found.[10]

§ 1543. **Constable's Deputy.**—In the absence of statutory provisions as to the appointment of deputies by constables, the

[1] South v. State of Maryland, 18 How. U. S. 396.

[2] Miller v. Stewart, 9 Wheat. 702; Hunt v. Adams, 6 Mass. 521; Martin v. Thomas, 24 How. U. S. 315.

[3] Speake v. United States, 9 Cranch, 28. The question whether the addition of a surety, without the knowledge of the former surety, avoids the bond, was raised in O'Neale v. Long, 4 Cranch, 60.

[4] People v. Love, 25 Cal. 520.

[5] U. S. v. Brown, 1 Paine, 422.

[6] People v. Love, 25 Cal. 520.

[7] Id.

[8] State v. Shacklett, 37 Mo. 280.

[9] Van Pelt v. Littler, 14 Cal. 194.

[10] Lawton v. Irwin, 9 Wend. 233.

common-law rule applies, and constables may act by deputy, in the exercise of their ministerial functions.[1]

§ 1544. **Copy of Bonds.**—If a copy of the bond sued on is set out in the complaint, an answer denying its execution, which is not verified, admits its due execution.[2]

§ 1545. **County Assessor.**—In suit upon the official bond of a county assessor, who had received a certificate of election, given bond, and entered upon his duties, neither the principal nor the sureties can deny the official character of the assessor. They are estopped by the bond.[3]

§ 1546. **Date of Bonds.**—Where the date of a surety bond is subsequent to the appointment of the principal to office, the declaration should allege that the money collected by the principal remained in his hands at the time when the surety bond was executed.[4]

§ 1547. **Defect in Bonds.**—If there is a defect in an official bond by the failure of the principal to place a seal opposite his name, the defect will not defeat a recovery thereon as against the sureties, if the defect is suggested in the complaint.[5]

§ 1548. **Delivery.**—In a suit on a bond, delivery must be alleged; but the omission to allege it can only be taken advantage of by demurrer; it is cured by verdict.[6] The production of the bond in court by the obligee, is sufficient evidence of its delivery.[7]

§ 1549. **Execution of Bonds.**—If the complaint on an official bond avers the due execution of the same by both principal and sureties, and the answer takes issue on the averment, and the verdict and judgment are for plaintiff, the judgment will not be disturbed on appeal upon the judgment roll, on the ground that what purports to be a copy of the bond annexed to the complaint does not contain the signature of the principal.[8] If sureties on an official bond sign with an express understanding with the principal in the bond, that certain other persons shall sign as sureties, and that unless such other persons sign, it shall not be delivered, a delivery of the bond to the obligee, without the signature of such other persons, does not render it invalid as to the sureties who do sign.[9]

§ 1550. **For Selling Homestead.**—A complaint against a sheriff and his sureties for selling under execution the home-

[1] Jobson v. Fennell, 35 Cal. 711.
[2] Sacramento Co. v. Bird, 31 Cal. 66.
[3] People v. Jenkins, 17 Cal. 500.
[4] United States v. Linn, 1 How. U. S. 104.
[5] Sacramento Co. v. Bird, 31 Cal. 66.
[6] Garcia v. De Satrustegui, 4 Cal. 244.
[7] Tidball v. Halley, 48 Cal. 610.
[8] Mendocino Co. v. Morris, 32 Cal. 145.
[9] Tidball v. Halley, 48 Cal. 610

stead of plaintiff, which sets out that the sheriff was in possession of a certain execution against the plaintiff, Richard Roe, under which he sold the property, and averring damages in the sum of two thousand dollars, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action, for the sheriff's deed conveys nothing if the property was a homestead.[1]

§ 1551. **Judgment.**—In an action against the principal and sureties on an official bond, the court should first fix the amount of the defalcation of or recovery from the former, and then proceed with a separate judgment against each of the sureties for the full amount for which he has made himself liable, and that each shall be satisfied by the collection or payment of such defalcation, or recovery and costs.[2] A judgment for damages against an officer for official delinquency, which remains unsatisfied, will not prevent a subseque t action on the official bond.[3]

§ 1552. **Liabilities of Obligors.**—After a bond has been received and acted on by the county officers, the obligors are liable as if it had been approved; but this liability applies only to the duties properly appertaining to his office as such and not to the duties belonging to a distinct office, with the execution of which he may charged.[4] If the penal sum is changed in an official bond after the principal obligor has executed the same, and he then forwards it for approval, he is liable on the bond as approved.[5] The liability is several as well as joint, unless expressed to be only joint, and the plaintiff may sue one or both sureties.[6] The sureties on a sheriff's bond are not liable for his acts or omissions in the service of a precept which by law he was not authorized to serve.[7]

§ 1553. **Marshal's Bond.**—In an action on a marshal's bond, it is not necessary to aver that the penalty has not been paid. The usual averment of the breach of the condition is sufficient.[8] To an action on a marshal's bond, for taking insufficient security on a replevin bond, a plea in bar that a levy was made on goods, and chattels, lands, and tenements, sufficient to satisfy the judgment, is good.[9]

§ 1554. **Ministerial Duties.**—It is not only for a breach of his duty in the execution of his ministerial offices, that the

[1] Kendall v. Clark, 10 Cal. 18.
[2] People v. Rooney, 29 Cal. 642.
[3] State v. Kruttschnitt, 4 Nev. 178.
[4] People v. Edwards, 9 Cal. 286.
[5] People v. Kneeland, 31 Cal. 288.
[6] Morange v. Mudge, 6 Abb. Pr. 243.
[7] Dane v. Gillmore, 51 Me. 544.
[8] Sperring v. Taylor, 2 McLean, 362; compare Hazle v. Waters, 3 Cranch C. Ct. 420.
[9] Sedam v. Taylor, 3 McLean, 547.

sheriff and his sureties are liable upon his bond.[1] He should not be required to come prepared to justify his whole official conduct.[2]

§ 1555. **Misjoinder of Causes of Action.**—A cause of action on an official bond against the principal and his sureties can not be united with a cause of action for damages against the principal alone.[3]

§ 1556. **Non-payment of Money.**—Declaring on a sheriff's bond for the non-payment of money received by him for military fines, it is not necessary to name who paid the money to him, or issued the warrants on which it was collected; a reference to the statute makes the breach certain enough.[4]

§ 1557. **Notice.**—No averment of notice to the defendant is requisite in the complaint, where the matters assigned as breaches lie as much in the knowledge of one party as the other.[5]

§ 1558. **Receiver's Bond.**—The sureties on a receiver's bond are only bound from the date of the bond; and if the bond bears date some months after the official term of the receiver commenced, the declaration is defective if it omits to show the receipt of the money after the date of the bond, and before the expiration of his official term.[6] A declaration which charged a receiver of public moneys with not paying over moneys which came into his hands the day after his bond expired, is bad on demurrer.[7]

§ 1559. **Request or Demand.**—Where a county treasurer has embezzled and converted money of the county it is not necessary for the supervisors to make a request or demand before a suit on his bond.[8]

§ 1560. **Retaining Commissions.**—In an action on an official bond of a county treasurer, if the complaint avers only a breach by a failure of the treasurer to keep the money in the county safe, and by a withdrawal of the same and conversion to his own use, a recovery can not be had for a failure of the treasurer to pay into the treasury his commissions retained on payments made to the state.[9]

§ 1561. **Retaining Money.**—An averment in a complaint on a county treasurer's official bond that he received money be-

[1] South v. Maryland, 18 How. U. S. 396.

[2] People v. Brush, 6 Wend. 454; People v. Russell, 4 id. 570.

[3] State v. Kruttschnitt, 4 Nev. 178.

[4] People v. Brush, 6 Wend. 454.

[5] People v. Edwards, 9 Cal. 292. See Tomlinson v. Rowe, Hill & D. Supp. 410.

[6] U. S. v. Spencer, 2 McLean 405.

[7] Id.

[8] Supervisors of Allegany v. Van Campen, 3 Wend 48.

[9] Sacramento County v. Bird, 31 Cal. 66.

longing to the county and retains it, and refuses to deliver it to his successor in office, is a sufficient averment of a breach of its conditions.[1]

§ 1562. **Treasurer's Bond.**—A complaint in an action against a treasurer, for a failure to pay his successor money which came into his hands, should allege that it remained in his hands at the expiration of his term.[2] And where the treasurer has paid over to his successor the amount found due against him, he is still liable for all moneys actually received by him as such treasurer, and by mistake not charged to him in such accounting.[3] The liability of the sureties continues till he has rendered a just and true account of such moneys.[4]

§ 1563. **Trespass.**—A complaint in an action against a sheriff and his sureties, for an alleged trespass of the sheriff, should allege that the bond was the sheriff's official bond, and set out enough of its contents to show that those who signed it were bound to indemnify parties injured by sheriff's malfeasance.[5] In trespass for taking goods, against a sheriff who justified under a writ of attachment against a third person, he called as a witness his deputy, who stated that he served the attachment, and related certain conversation between himself and the plaintiff. On cross-examination, he stated that "he was deputy sheriff, and under bonds to the sheriff." Whereupon plaintiff moved to strike out his testimony on the ground of interest; it was held that the motion was properly denied, as from the answer it was not certain that the character of his bonds was such as to make him interested.[6] If the complaint in an action against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of cause of action.[7] A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, which merely avers that the sureties are the securities on his official bond, and that the same was duly filed, executed, and recorded, does not state a cause of action on the bond.[8] In an action on a replevin bond the defendant's liability is limited to the damage sustained by a failure to return the property.[9]

[1] Mendocino County v. Morris, 32 Cal. 145.
[2] Puckett v. State, 24 Ind. 366.
[3] Jefferson County v. Jones, 19 Wis. 51.
[4] Id.
[5] Ghirardelli v. Bourland, 32 Cal. 585.
[6] Fowdy v. Ellis, 22 Cal. 650.
[7] Ghirardelli v. Bourland, 32 Cal. 585.
[8] Id.
[9] Hunt v. Robinson, 11 Cal. 262.

CHAPTER X.

ON WARRANTIES OF CHATTELS.

§ 1564. Warranty of Title.

Form No. 407.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the .... day of ....., 18.., at ....., the defendant sold to the plaintiff [state the article sold], for ..... dollars.

II. That by said contract of sale it was understood by the plaintiff and the defendant to be, and it was a part of the terms and consideration of said contract of sale, that the defendant had the lawful right and title to so sell, and to transfer the ownership of said goods to the plaintiff.

III. That the defendant had, in fact, no right or title to sell or dispose of said goods.

IV. That one E. F. then was the owner of said goods, and afterwards, on the .... day of ....., 18.., he demanded possession of the same from the plaintiff; and the plaintiff was compelled, and did then deliver them up to E. F., and they were wholly lost to the plaintiff.

V. That by reason of the premises the plaintiff was misled and injured, to his damage ..... dollars.

[DEMAND OF JUDGMENT.][1]

§ 1565. **Sales by Auctioneer.**—There seems to be a doubt whether in an ordinary sale of goods by auction, an auctioneer has any right or authority to warrant goods sold by him, in the absence of any express authority from his principal to do so, and without proof of some known and established usage of trade from which an authority can be implied.[2] It may be accepted generally as the true doctrine that they are special agents having authority to sell, and not to warrant.[3]

§ 1566. **Effect of General Warranty.**—A general warranty does not extend to defects inconsistent therewith, of which the buyer was then aware, or which were then easily decernible by him without the exercise of peculiar skill, but it extends to all other defects.[4]

[1] For the provisions of the California civil code relating to warranty or chattels, see secs. 1763–1778.

[2] See Upton v. Suffolk Co. Mills, 11 Cush. (Mass.) 589; Blood v. French, 9 Gray, 197.

[4] The Monte Allegre, 9 Wheat. 616, 647; see Dent v. McGrath, 3 Bush (Ky.), 174; see also Civil Code Cal., secs. 1765, 1798.

[3] Civil Code Cal., sec. 1778.

§ 1567. **Implied Warranty of Title.**—Where the vendor of chattels in his possession gives a written bill of sale containing no covenant of warranty, there is an implied warranty of title.[1] The vendor in possession warrants the goods by implication; unless at the time he expressly disavows an intent to do so.[2] But if out of the possession of the vendor, in the absence of fraud, the buyer takes at his own risk.[3] The use of a certain name in a sale note for the goods sold is a warranty that they bear that name.[4] The complaint need not aver the warranty, for this implied warranty is an inference of law.[5]

§ 1568. **Judicial Sale.**—Upon a judicial sale, the only warranty implied is that the seller does not know that the sale will not pass a good title to the property.[6]

§ 1569. **Measure of Damages.**—In an action upon an implied warranty of title to personal property, where a judgment in trover has been obtained against the purchaser, the measure of damages is the damages and costs recovered by the true owner with interest thereon.[7] But where the goods are replevied of the buyer, their value alone, and not damages for their detention, nor attorneys' fees paid by him for defending the title, is held to be the measure of damages.[8]

§ 1570. **Money.**—On an exchange of money, each party thereby warrants the genuineness of the money given by him.[9]

§ 1571. **Skill—Implied Warranty of.**—When a skilled laborer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes.[10]

§ 1572. **Waiver of Warranty.**—The complaint in an action to recover the price of a machine, sold with a warranty, under an agreement that the continued use of the machine by the vendee should be regarded as a waiver of the warranty, need not allege that the machine corresponded with the warranty if it avers the continued use of it by the vendee.[11]

§ 1573. **Warranty of Title.**—If the seller has possession of the article, and sells it as his own and not as agent for another, and for a fair price, he is understood to warrant the title.[12]

[1] Miller v. Van Tassel, 24 Cal. 458; Gross v. Kierski, 41 Id. 111.
[2] Miller v. Van Tassel, 24 Cal. 458; Rew v. Barber, 3 Cow. 272.
[3] 3 Kent (5th ed.), 478; McCoy v. Artcher, 3 Barb. 323; Edick v. Crim, 10 Id. 445.
[4] Flint v. Lyon, 4 Cal. 17.
[5] Van Santv. on Pl. 287.
[6] Civil Code Cal., sec. 1777.
[7] Blasdale v. Babcock, 1 Johns. 617; Armstrong v. Percy, 5 Wend. 535.
[8] Id.; but see Lewis v. Peake, 7 Taunt. 152; see, also, Polhemus v. Herman, 45 Cal. 573.
[9] Civil Code Cal., sec. 1807.
[10] 5 Robinson's Pr. 707.
[11] Bragg v. Bamberger, 23 Ind. 198.
[12] 2 Kent's Com. 478.

In New York, a warranty of title is implied from an unqualified sale.[1] And it extends to the right to the use of the thing sold, *e. g.*, a patented article.[2] But it arises only in cases where the vendor is in possession.[3] In every sale of personal property, except a judicial sale, there is implied warranty of title or of peaceable possession.[4]

§ 1574. **Warranty by Agent.**—An agent, whether general or special, who is authorized to sell personal property, is presumed to possess the power of warranting its quality and condition, unless the contrary appear.[5] So an agent, employed to sell negotiable paper, may, in the absence of any limitation of his authority, represent it as a business note, and valid.[6]

§ 1575. **Warranty, on Sale of Written Instrument.**—One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is mater al, the extinction of its obligations, or its invalidity for any cause.[7]

§ 1576. **Warranty by Seller.**—One who sells or agrees to sell personal property, knowing that the buyer relies on his advice or judgment, thereby warrants to the buyer that neither the seller nor any agent employed by him in the transaction knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy.[8]

§ 1577. **On Warranty of Quality.**

Form No. 408.

[TITLE]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the defendant warranted a steam engine to be in good order, and thereby induced the plaintiff to purchase the same of him, and to pay to him ..... dollars therefor.

II. That the said steam engine was not then in good order, whereby plaintiff was damaged in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

[1] Carman v. Trude, 25 How. Pr. 440; Scranton v. Clark, 39 Barb. 273; and see Sweetman v. Prince, 26 N. Y. 224.

[2] Carman v. Trude, 25 How. Pr. 440.

[3] Scranton v. Clark, 39 Barb 273.

[4] Porte v. United States, Dev. 57; see Puckett v. United States, Id. 103. see Civil Code, sec. 1765; Gross v. Kierski, 41 Cal. 111.

[5] Nelson v. Cowing, 6 Hill, 336; Tice v. Gallop, 5 N. Y. (S. C.) 51; Palmer v. Hatch, 46 Mo. 585; see Bryant v. Moore, 26 Me. 84.

[6] Ferguson v. Hamilton, 35 Barb. 427, 442; Fenn v. Harrison, 4 T. R. 177; but see Lipscomb v. Kitrell, 11 Humph. 256.

[7] Civil Code Cal., sec. 1774.

[8] Civil Code Cal., sec. 1767.

§ 1578. **Assignment of Breach.**—The agreement to take back property, sold under a warranty of soundness, but which proved unsound, or whereby defendant agreed to pay a sum of money in consideration of said unsoundness and consequent rescission of sale, does not require assignment of a special breach, within the meaning of the code.[1]

§ 1579. **Averment of Warranty.**—A general averment of warranty is sufficient, as that the seller warranted the article to be of good quality.[2]

§ 1580. **Caveat Emptor.**—That the buyer must take care or be on his guard,[3] is a leading maxim of the law relating to the contract of sale; and its application is not affected by the circumstances that the price is such as is usually given for a sound commodity.[4] If the vendor warrants the quality of the articles he sells, he is bound to deliver them of the stipulated quality, and the examination and selection of some of the articles by the vendee when they are delivered, does not amount to a waiver of the contract.[5]

§ 1581. **Damages on Breach.**—Under the forms of pleading at common law, the vendee of chattels sold with a warranty of title could, on a breach of the warranty, recover damages in *assumpsit*, or he might sue in an action on the case for deceit, if there had been deceit, as well as warranty of title; but, in the first case, he must aver specially that the defendant warranted his title to the property, and that a breach of the warranty had occurred, and in the latter, that the defendant falsely or fraudulently represented himself to be the owner of the property, and that he knew his representations were false.[6]

§ 1582. **Damages, Measure of.**—When the vendor of personal property is sued for a failure of title, the measure of damages is the price paid by the plaintiff.[7]

§ 1583. **Executory Contract.**—An executory contract for the sale of corn requires that it shall be in good and marketable condition, without express words to that effect.[8] A contract to deliver to the defendants, who were manufacturers of barrels and staves, a certain quantity of stave bolts, was held to re-

[1] Stone v. Watson, 37 Ala. 279.
[2] Hoe v. Sanborn, 21 N. Y. 552.
[3] Hob. 99; Co. Lit. 102, a; 2 Inst. 714; Broom's Max. 605.
[4] 2 Steph. Com. 826; Cro. Jac. 2; Hargous v. Stone, 1 Seld. 88; 2 Wood's Lect. 251; 2 Kent's Com. 478; 1 Story's Eq. Jur. 212.
[5] Willings v. Consequa, Pet. C. Ct. 301. As to warranty on the sale of chattels, see secs. 1763–1786, inclusive, Cal. Civil Code.
[6] Miller v. Van Tassel, 24 Cal. 458; Polhemus v. Heiman, 44 Id. 573.
[7] Arthur v. Moss, 1 Or. 193.
[8] Peck v. Armstrong, 38 Barb. 215; and see Koop v. Handy, 41 Id. 454.

quire a delivery of bolts of a good merchantable quality, and suitable for the purposes for which they were intended.[1] A contract for the sale of "oxalic acid," even when the seller is not the manufacturer, and at the time of contracting expressly declines all responsibility as to the quality, and the buyer has an opportunity of inspecting it, and no fraud exists, is not complied with by the delivery of an article which does not in commercial language come properly within the description of "oxalic acid."[2]

§ 1584. **Fraud need not be Alleged.**—No averment or knowledge of fraud is necessary to support this action.[3] Such an allegation sounds in tort.[4] And if inserted in the complaint,[5] the plaintiff may be compelled to elect on the trial between the two grounds of liability.[6]

§ 1585. **Implied Warranty.**—On a sale of an existing article, there is no implied warranty that the article is suitable for the purpose for which it was purchased.[7] In every agreement for the future sale of merchandise, there is an implied warranty that it shall be merchantable.[8] So when one sells an article of his own manufacture, there is an implied warranty that the article is free from any defect produced by the manufacturing process itself; and where the defect is in the materials employed, the warranty is implied only where he is shown or may be presumed to have known the defect.[9]

§ 1586. **Quality, how Averred.**—The unsound condition of the chattel should be averred according to the fact, in direct and positive terms, and if valueless, that it was worth nothing, and was of no value.[10]

§ 1587. **Sale by Sample.**—On a sale by sample there is an implied warranty that the article shall correspond with the sample; but an examination of samples, when there is an express warranty, is not a waiver of the warranty.[11] The law presumes that the only warranty is that the bulk shall conform to the sample in kind and quality.[12]

§ 1588. **Warranty of Quality.**—No particular form of words is essential to constitute a warranty of quality. An asser-

[1] Ketchum v. Wells, 19 Wis. 25.
[2] Josling v. Kingsford, 13 C. B., N. S., 447.
[3] Holman v. Dord, 12 Barb. 336; Williamson v. Allison, 2 East, 446.
[4] Id.
[5] Edick v. Crim, 10 Barb. 445.
[6] Springsteed v. Lawson, 14 Abb. Pr. 328; Sweet v. Ingerson, 12 How. Pr. 331:
[7] Milburn v. Belloni, 34 Barb. 607.
[8] Hamilton v. Ganyard, 34 Barb. 204; Civil Code, s c. 1768.
[9] Hoe v. Sanborn, 21 N. Y. 552; Civil Code, sec. 1769.
[10] Deifendorff v. Gage, 7 Barb. 18.
[11] Willings v. Consequa, Pet. C. Ct. 301.
[12] Ramsdell v. United States, 2 Ct. of C. (Nott & H.) 508.

tion of the vendor, if relied upon by the vendee, and understood by both parties as an absolute assertion and not merely an expression of opinion, will amount to one.[1] Where the plaintiff inspects the goods before purchasing, the case is taken from the operation of the rule of implied warranty.[2] An advertisement of goods for sale, giving them a higher character than upon examination they turn out to merit, will not amount to warranty, where the purchaser relies upon his own inspection.[3] A mere praise of personal property, such as wool, indulged in by the owner when offering it for sale, does not amount to an implied warranty of its quality or condition, if the buyer has an opportunity to examine it and fails to do so, and no artifice is used by the seller to prevent him from making an examination.[4] If one party contracts to deliver the other wool "in good order," and the latter agrees to accept and pay for it, the clause "in good order" is an express warranty.[5]

§ 1589. **On Warranty of Soundness.**

Form No. 409.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant sold to the plaintiff a horse, for ..... dollars.

II. That by the said contract of sale the defendant warranted the said horse to be sound, and thereby induced the plaintiff to purchase the same of him, and to pay him therefor the said price of ..... dollars.

III. That the said horse was at the time of said sale unsound in this: that [state wherein he was unsound].

IV. That the plaintiff was misled and injured thereby, and has sustained damages by reason of the premises, to the amount of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1590. **Duty of Purchaser.**—A purchaser can not proceed without inquiry or examination to use an article which will damage his business, relying upon a warranty which only goes to the fact of the nature or character of the article, and not to the effect of using it, and still hold the vendor responsible for the consequences.[6]

[1] Polhemus v. Heiman, 45 Cal. 573; Sweet v. Bradley, 24 Barb. 549; Chapman v. Murch, 19 Johns. 290; Carley v. Wilkins, 6 Barb. 557; Wilbur v. Cartright, 44 Id. 536.

[2] Moore v. McKinlay, 5 Cal. 471. The grounds and principles upon which warranties of title, of quality, etc., are implied, considered in Hoe v. Sanborn, 21 N. Y. 552.

[3] Calhoun v. Vechio, 3 Wash. C. Ct. 165; McVeigh v. Messersmith, 5 Cranch C. Ct. 316.

[4] Byrne v. Jansen, 50 Cal. 624.

[5] Polhemus v. Heiman, 50 Cal. 488.

[6] Milburn v. Belloni, 34 Barb. 607.

§ 1591. **Measure of Damages.**—The plaintiff may recover the difference between the value of the chattel as warranted and as found to be by the court or jury, and special damages for injuries occasioned by the condition of the chattel.[1] Special damages for injuries occasioned by the condition of the chattel must be averred, as the communication of infectious diseases by an animal warranted sound.[2]

§ 1592. **That Plaintiff Relied on Warranty.**—A complaint which alleges that plaintiff purchased of defendant twenty-seven head of hogs; that defendant represented them to be sound and healthy; that the plaintiff relied on said representations, having no opportunity by ordinary diligence to discover that the same were not true; that in fact they were diseased and unhealthy, being then infected with hog cholera, and known to be so by the defendant, and that afterwards twenty-five of them died with that disease, is good on demurrer.[3]

§ 1593. **The Plaintiff was Misled.**—The complaint must aver that the plaintiff was actually misled by reason of the warranty.[4]

§ 1594. **Warranty of Soundness.**—A general warranty of soundness covers even visible defects of a chattel, unless they are such as could be discerned by an ordinary observer without peculiar skill.[5] A mere cold controllable by ordinary remedies, not affecting the general health or usefulness of a horse, is not an unsoundness.[6] A guaranty that the article should pass inspection is nothing more than the usual warranty of the soundness and quality of the thing sold.[7]

§ 1595. **Rights in Case of Breach.**—The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition.[8]

§ 1596. **On a Warranty of Judgment.**

Form No. 410.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., the defendant, for a valuable consideration, assigned to this plaintiff a judgment which on the ..... day of ....., 18.., he recovered

[1] Jeffrey v. Bigelow, 13 Wend. 518.
[2] Id.
[3] Baker v. McGinniss, 22 Ind. 257.
[4] Holman v. Dord, 12 Barb. 336; Oneida Mfg Soc. v. Lawrence, 4 Cow. 440.
[5] Chit. Con. 456; Pars. Merc. Law, 57; Margetson v. Wright, 20 Eng. C. Law, 269; Birdseye v. Frost, 34 Barb. 367.
[6] Springsteed v. Lawson, 14 Abb. Pr. 328; 23 How. Pr. 302.
[7] Gibson v. Stevens, 8 How. U. S. 384.
[8] Civil Code Cal., sec. 1786.

in the superior court of the county of ....., for the sum of ..... dollars, in a certain action wherein A. B., defendant above named, was the plaintiff, and one C. D. was defendant.

II. That said assignment contained a covenant on the part of the defendant, of which the following is a copy [copy of the covenant].

III. That in truth, at the time of said assignment, said judgment had been paid in full to the defendant, and no part thereof was or now is due thereon.

IV. That by means of the premises this plaintiff was misled and injured, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1597. On a Warranty of a Note.

Form No. 411.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., the defendant offered to pass to the plaintiff, for a valuable consideration, a promissory note, of which the following is a copy [copy of the note], and he then and there warranted the said note to have been made by the said A. B.

II. That the plaintiff, relying upon said warranty, purchased said note of the defendant, and paid therefor the sum of ..... dollars.

III. That said note was not made by said A. B.; that his name was forged thereto.

IV. That by reason of the premises the plaintiff was injured and misled, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

CHAPTER XI.

SEVERAL CAUSES OF ACTION UNITED.

§ 1598. Cause of Action under the Money Counts.

Form No. 412.

[TITLE.]

The plaintiffs complain, and allege:

I. That at the times hereinafter mentioned, the plaintiffs were partners, doing business at the city and county of San Francisco, state of California, under the firm name of A. B. & Co., and the defendants were partners doing business at the said city and county of San Francisco, under the firm name of C. D. & Co.

First.—For a first cause of action, the plaintiffs allege:

I. That on the ..... day of .. .., 18..., at ....., at the request of the defendants, the plaintiffs deposited with the defendants the sum of ..... dollars, gold coin of the United States, which sum the defendants promised to pay to the plaintiffs on demand.

II. That on the ..... day of ....., 18.., at ....., the plaintiffs demanded payment of the same from the defendants, but they have not paid the same.

Second.—And for a second cause of action, the plaintiffs allege:

I. That on the ..... day of ..... 18 , at ....., the defendants received ..... dollars from one E. F., to be paid to the plaintiffs.

II. That the defendants have not paid the same.

Third.—And for a third cause of action, the plaintiffs allege:

I. That on the ..... day of ....., 18..., at ....., the plaintiffs lent to the defendants ..... dollars.

II. That the defendants have not paid the same.

[DEMAND OF JUDGMENT.][1]

§ 1599. **Accounts.**—When separate accounts between the same parties are separate causes of action, they may be separately stated.[2] The plaintiff may demand in the same action

[1] The plaintiff may unite several causes of action in the same complaint where they all arise out of: 1. Contracts, express or implied; 2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; 3. Claims to recover specific personal property, with or without damages for the withholding thereof; 4 Claims against a trustee by virtue of a contract, or by operation of law; 5. Injuries to character; 6. Injuries to person; 7. Injuries to property.

The causes of action must belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person: Cal. Code C. P., sec. 427; N. Y. Code Proc., sec. 484. The Ohio code, sec. 80, permits the joinder of causes of action for injuries, with or without force, to person and property, or either. The Wisconsin code, sec. 31, is the same as the Ohio code. The Iowa code, sec. 2630, is as follows: "Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same party, and against the same party in the same rights, and if suit on all may be brought and tried in that county, may be joined in the same petition; but the court, to prevent confusion therein, may direct all or any portion of the issues joined therein to be tried separately, and may determine the order thereof." Under this section, tort and contract may be joined: Turner v. First Nat. Bank, 26 Iowa, 562. Code of Dakota, sec. 136, is copied from the Ohio Code; Nevada Code, sec. 64; Oregon Code, sec. 91.

[2] Phillips v. Berick, 16 Johns. 136; Stevens v. Lockwood, 13 Wend. 644; Staples v. Goodrich, 21 Barb. 317; Secor v. Sturgis, 2 Abb. Pr. 69.

that defendant account for and refund a proportion of the outfit and advances made on a joint adventure.[1]

§ 1600. **Causes of Action may be United.**—The plaintiff may unite several causes of action in the same complaint when they arise from and constitute part of the same transaction,[2] if such union does not amount to a misjoinder, in which case the objection can be raised only by demurrer.[3] But actions so united must affect all the parties to the action, and not require different places of trial; but the defendants need not be all equally affected.[4] An action for goods sold and for the price of goods wrongfully taken from a third person and sold, may be joined; the tort in the latter having been waived by its assignment,[5] and must belong to the same class,[6] and must be consistent with each other.[7]

§ 1601. **Claims in Two Capacities.**—Claims against trustees by virtue of a contract, or by operation of law, may be joined.[8] So, a trust and a vendor's lien may be united in one action.[9] Counts on promises to the testator and to his executor in his representative capacity may be joined.[10] Counts on promises made by the testator may be joined with counts on promises made by the administrator, as such.[11] After counts by the plaintiff, as executor, for an excessive distress, and for distraining for more rent than was due, the declaration proceeded thus: "And the plaintiff, as such executor as aforesaid, also sues the defendant for money paid by the plaintiff as such executor as aforesaid, for the defendant, at his request, and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on an account stated between them. And the plaintiff, as such executor as aforesaid, claims, etc. It was held, on demurrer, that the declaration was bad for misjoinder.[12]

§ 1602. **Class—Common Counts.**—Where the form of the action is the same, and where the same plea may be pleaded and the same judgment given on all the counts, they are well joined.[13] So, the common counts may be united in one com-

[1] Garr v. Redman, 6 Cal. 574.
[2] Cal. Code C. P., sec. 427.
[3] Fritz v. Fritz, 23 Ind. 388.
[4] Earle v. Scott, 50 How. Pr. 506; see Van Wagenan v. Hunt, 7 Hun, 328; Ladd v. James, 10 Ohio St. 437.
[5] Hawk v. Thorn, 54 Barb. 164.
[6] Cleveland v. Barrows, 59 Barb. 364.
[7] Smith v. Hallock, 8 How. Pr. 78.
[8] Cal. Code C. P., sec. 427.
[9] Burt v. Wilson, 28 Cal. 632.
[10] Brown v. Webber, 6 Cush. 571; Sullivan v. Holker, 15 Mass. 374.
[11] Hapgood v. Houghton, 10 Pick. 154; Dixon's Executors v. Ramsay's Administrators, 1 Cranch C. Ct. 472.
[12] Davies v. Davies, 1 Hurl. & Colt. 451.
[13] Fairfield v. Burt, 11 Pick. 244; Worster v. Canal Bridge, 16 Id. 541.

plaint, if separately stated.[1] But they cannot be united in one count as one cause of action, without any specification of the sums due upon each several cause.[2]

§ 1603. **Contracts.**—Causes of action arising from contracts, express or implied, may be united. Thus claims due as damages for delay, and a demand to set aside an award, all growing out of the same contract, may be united in one action.[3] To reform a written contract, and for judgment thereon, when reformed.[4] For reformation of a contract, and for damages for breach of it.[5] Damages for false representations, and for breach of contract.[6] Loss of goods by carrier, and also for freight overpaid.[7] A cause of action for false representations in inducing the plaintiff to enter into a contract, and a cause of action for a breach of the same contract, may be joined.[8] On the joinder of ordinary claims in contract with claims for which defendant is arrestable, the plaintiff may waive arrestability in the latter case.[9]

§ 1604. **Contract of Partners.**—A complaint, after stating cause of action on a contract against partners, and demanding judgment therefor, contained also allegations that the defendants were insolvent, and had fraudulently confessed judgment to hinder their creditors, and demanded an injunction and a receiver. Held, that although the last matter might be obnoxious to a motion to strike out, its insertion did not render the complaint demurrable.[10] In Massachusetts, a surviving partner may join in the same action a demand due to the firm, and another due to himself in his own right; or demands due to him as the surviving partner of two firms.[11]

§ 1605. **Each Cause Complete.**—Each separate cause of action, as stated, must be complete in itself, and must stand by itself.[12] And directly, that numerous items of a distinct class should be stated in distinct counts.[13]

[1] Freeborn v. Glazer, 10 Cal. 337; De Witt v. Porter, 13 Id. 171; Buckingham v. Waters, 14 Id. 146; Keller v. Hicks, 22 Id 457; Birdseye v. Smith, 32 Barb. 217.

[2] Buckingham v. Waters, 14 Cal. 146.

[3] See v. Partridge, 2 Duer, 463.

[4] Story's Eq. Jur., secs. 157–161; 2 Johns. Ch. 585; 4 Id. 144; Gooding v. M'Alister, 9 How. Pr. 123.

[5] Bidwell v. Astor Mut. Ins. Co., 16 N. Y. 263.

[6] Robinson v. Flint, 16 How. Pr. 240; 7 Abb. Pr. 393; see, however, Waller v. Raskan, 12 How. Pr. 28.

[7] Adams v. Bissell, 28 Barb. 382. As to contracts, with allegations of matters of fraud, see Roth v. Palmer, 27 Barb. 652.

[8] Robinson v. Flint, 7 Abb. Pr. 393, note; and see also Freer v. Denton, 61 N. Y. 492.

[9] Hickox v. Fay, 36 Barb. 9–14.

[10] Meyer v. Van Collem, 7 Abb. Pr. 222.

[11] Stafford v. Gold, 9 Pick. 533.

[12] Lattin v. McCarty, 17 How. Pr. 239; 8 Abb. Pr. 225; see also Watson v. S. F. & H. B. R. R. Co., 41 Cal. 17; Harsen v Bayaud, 5 Duer, 656; Dorman v. Kellam, 14 How. Pr. 184.

[13] Adams v. Holley, 12 How. Pr.

§ 1606. **Injuries to the Person.**—Claims for injuries to character, or injuries to character and malicious arrest and prosecution, may be united.[1] Plaintiff may recover in an action for the combined injury to character and person, when the matters arise from and constitute a part of the same transaction.[2]

§ 1607. **Injuries to Person and Property.**—It seems that negligence and the damage arising therefrom, both to the person and property of plaintiff may be united.[3] For one injury, all the acts of negligence should be alleged in one count.[4] Injuries resulting to both person and property, from the same negligent act, constitute but one cause of action.[5]

§ 1608. **Injuries to Property.**—Actions for injuries to property may be united.[6] The union in one count of a complaint of an allegation that defendants "have wrongfully built dams and flumes across said Mormon creek * * * so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they * * * hoist for the purpose of clearing out said dams and flumes of slum, stone, and gravel, the accumulation of which renders the water useless to plaintiff," does not make the complaint demurrable, on the ground that it unites several distinct causes of action in one count.[7] In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages for preventing plaintiff from working his claim.[8] Detention of property, and injury to it while detained, may be united.[9] Value of property destroyed, and damages, may be united.[10] Allegations for conversion and detention, and prayer for specific delivery, is no misjoinder, being held a demand for only one

826; Hillman v. Hillman, 14 Id. 456; and see also Longworthy v. Knapp, 4 Abb. Pr. 115.

[1] Cal. Code C. P., sec. 427; Howe v. Peckham, 6 How. Pr. 229; S. C., 10 Barb. 656; Hull v. Vreeland, 42 Id. 543; 18 Abb. Pr. 182.

[2] Jones v. Steamship Cortes, 17 Cal. 487. Criminal conversation with plaintiff's wife held to be an injury to the person: Dalamater v. Russell, 2 Code R. 147. So also is seduction: Taylor v. North, 3 Id. 9.

[3] Williams v. Holland, 10 Bing. 112, 117; Blinn v. Campbell, 14 Johns. 433; Wilson v. Smith, 10 Wend. 328; 1 Ch. Pl. 127; Howe v. Peckham, 6 How. Pr. 229.

[4] Dickens v. N. Y. Cent. R. R. Co., 13 How. Pr. 228.

[5] Howe v. Peckham, 10 Barb. 656; S. C., 6 How. Pr. 229.

[6] Cal. Code C. P., sec. 427: Moore v. Massini, 32 Cal. 590; Howe v. Peckham, 6 How. Pr. 229.

[7] Gale v. Tuol. W. Co., 14 Cal. 25.

[8] Fraler v. Sears Union Water Co., 12 Cal. 555.

[9] Smith v. Orser, 43 Barb. 187.

[10] Tendeson v. Marshall, 8 Cal. 440.

kind of remedy.[1] For violation of agreement, and for injury to personal property.[2] Damages and injunction may be joined in an action for threatened injury to property. The owner of land may join in the same complaint a claim for damages, as assignee, caused by a trespass on the land, while it was owned by his grantor, and a claim for an injunction for a threatened injury to the land.[3] The plaintiff may join in the same complaint a cause of action for distinct and independent injuries to property, and the property injured in each cause of action may be the same or different, and may be either personal or real.[4]

§ 1609. **Jurisdiction.**—Where the separate causes of action amount together to more than the sum required to give jurisdiction, if joined in one declaration they will give jurisdiction.[5]

§ 1610. **Money Counts and Warranty.**—Money counts may be added to a count on the warranty. Or a count for deceit may be added to a count on the warranty.[6] But a claim in *assumpsit* for warranty of a horse, and for wrongfully concealing his defects, could not be united.[7] But when the form of action in tort is adopted, it is not necessary, to enable plaintiff to recover upon the count for false warranty, that a *scienter* should be averred.[8]

§ 1611. **Money Had.**—A claim for money had and received, and a claim for the delivery of a satisfied promissory note, arising out of the same transaction, may be united.[9]

§ 1612. **Quantum Meruit.**—A *quantum meruit* or a *quantum valebat* may be joined with counts upon a specialty.[10]

§ 1613. **Separate Demands.**—Separate demands under one and the same right may likewise properly be joined in the same count.[11] Several grounds of liability against the same defendant, arising out of the same transaction, may be joined in one action.[12] By the same plaintiff, as devisee for rent, and as executrix, for breach of covenant, all arising out of the same lease.[13] So also claims against the same defendant in different

[1] Vogel v. Badcock, 1 Abb. Pr. 176.
[2] Badger v. Benedict, 1 Hilt. 414; 4 Abb. Pr. 176.
[3] Moore v. Massini, 32 Cal. 590.
[4] Id.
[5] Ridgway v. Pancost, 1 Cranch C. Ct. 88.
[6] Vail v. Strong, 10 Vt. 457; Dobbin v. Fowles, 2 Cranch C. Ct. 65.
[7] Sweet v. Ingerson, 12 How. Pr. 331; Springstead v. Lawson, 23 Id. 302.
[8] Brown v. Edgington, 2 Man. & G. 279; Holman v. Dord, 19 Barb. 336; Schuchardt v. Allens, 1 Wall. 359.
[9] Cahoon v. Bank of Utica, 7 How. Pr. 401.
[10] Smith v. First Cong. Meeting-house of Lowell, 8 Pick. 178; Van Deusen v. Blum, 18 Id. 229.
[11] Longworthy v. Knapp, 4 Abb. Pr. 115.
[12] Durant v. Gardner, 19 How. Pr. 94; 10 Abb. Pr. 445.
[13] Armstrong v. Hall, 17 How. Pr. 76.

capacities may be united.[1] For money received on account of an estate, and also for a promissory note which is part of the estate, but payable to the executor individually.[2] So of claims against various parties, liable to contribute their proportion for repairs, for the general benefit of all.[3] Against constable for different breaches of duty, and against his surety, held capable of joinder.[4] It would also seem that in New York, a claim by a stockholder, who is also a judgment creditor of a corporation, may in certain cases maintain an action against the corporation, and against its other stockholders, and its other credit rs, with a view to ascertain and provide for the rights of all parties.[5]

§ 1614. **Several Counts.**—A complaint which contains a count setting forth the facts attending the purchase of a county warrant by plaintiff, and charging that defendants are liable upon an implied contract to repay the purchase money, and a second count charging defendants as indorsers of negotiable paper and a third count in the usual form for money had and received, is not demurrable on the ground of a misjoinder of causes of action.[6] In Iowa, a party may state in one count a cause of action on a note, and in another a cause of action on the consideration of a note.[7]

§ 1615. **Specific Performance.**—A claim for specific performance of a contract to convey real estate, and for payment of a reasonable sum for use and occupation, is not setting up two distinct causes of action which can not be united.[8] Grantor with warranty, and holder of an incumbrance, may be joined, to obtain satisfaction of such incumbrance, and a recovery over for any amount found due on it.[9]

§ 1616. **Specific Personal Property.**—Claims for the recovery of specific personal property, with or without damages for the withholding thereof, may be joined.[10] So also replevin and fraud may be united.[11]

§ 1617. **Specific Real Property.**—Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits on the same, may be united.[12] A complaint in ejectment

[1] Pugsley v. Aiken, 1 Kern. 494; Lord v. Vreeland, 13 Abb. Pr. 195.
[2] Welles v. Webster, 9 How. Pr. 251.
[3] Denman v. Prince 40 Barb. 213.
[4] Moore v. Smith, 10 How Pr. 361.
[5] Geery v. New York & Liverpool S. S. Co., 12 Abb. Pr. 268.
[6] Keller v. Hicks, 22 Cal. 457.
[7] Camp v. Wilson, 16 Iowa, 225.
[8] Spier v. Robinson, 9 How Pr. 325.
[9] Wandle v. Turney, 5 Duer, 661.
[10] Cal. Code Civil Proc., sec. 427.
[11] Pruebody v. Jacobson, 2 Cal 269.
[12] Cal. Code C. P., sec. 427; Sullivan v. Davis, 4 Cal. 291; Hoffman v. Tuol. W[illegible]er Co., 10 Id. 413; Gale v. Tuol. W[illegible]er Co., 14 Id. 25; Hotchkiss v. Auburn and Rochester R. R. Co., 36 Barb. 600.

may be for two separate and distinct pieces of land, but the causes of action must be separately stated, and affect all the parties to the action, and not require different places of trial.[1] Otherwise it would appear that the old form of declaring in ejectment by separate counts is no longer admissible.[2]

§ 1618. **Specific Relief.**—Claims by a debtor to have obligations delivered up and canceled, and an account of the securities pledged for them, and payment of the overplus, is but one cause of action.[3] A cause of action for reformation of mortgage, and for simultaneous foreclosure, may be united.[4] So, suit against indorser for liability on note, and for decree against mortgagor foreclosing the mortgage, may be united;[5] and a claim to reform an assignment in part, and for accounting under it when reformed.[6]

§ **Trespass.**— In Massachusetts, under trespass, the several species of *quare clausum* and *de bonis asportatis* may be joined.[7] Counts in trespass upon the case may be joined with a count in trover.[8] So, a cause of action for cutting wood, and also one for the conversion of wood, may be combined.[9]

[1] Boles v. Kohen, 15 Cal. 150.
[2] St. John v. Pierce, 22 Barb. 362.
[3] Cahoon v. Bank of Utica, 7 N. Y. 486; S. C., 7 How. Pr. 401; reversing 1a. 134.
[4] Depuyster v. Hasbrouck, 1 Kern. 582.
[5] Rollins v. Forbes, 10 Cal. 299; Eastman v. Turman, 24 Id. 382.
[6] Garner v. Wright, 28 How. Pr, 92.
[7] Bishop v. Baker, 19 Pick. 517.
[8] Ayer v. Bartlett, 9 Pick. 160.
[9] Rodgers v. Rodgers, 11 Barb. 595.

SUBDIVISION FIFTH.

FOR DAMAGES UPON WRONGS.

PART FIRST — FOR INJURIES TO THE PERSON.

CHAPTER I.

FOR ASSAULT AND BATTERY.

§ 1620. **Common Form.**

Form No. 413.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., the defendant violently assaulted the plaintiff, and struck him [state where] several blows, and also tore the clothes from the plaintiff's person [describe the violence used, and its consequences]; to his damage ..... dollars.

Wherefore the plaintiff demands judgment for ..... dollars, his damages aforesaid.

§ 1621. **Abatement of Action.**—Action for assault and battery can only be brought in the name of the party immediately injured, and if he dies the remedy determines.[1] This is the rule at common law, but is changed by the statutes of many of the states. And for injuries committed on the wife by battery, husband and wife must join; and if she die before judgment the suit abates.[2] But if the wife dies after judgment, the judgment survives to the husband.[3]

§ 1622. **Assault Defined—Instances.**—An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.[4] An assault is an offer to strike, beat, or commit an act of violence on the person of another, without actually doing it or touching his person;[5] striking at a person with the hand or with a stick, or by shak-

[1] 1 Chit. Pl. 60.
[2] 1 Chit. Pl. 73.
[3] 12 Serg. & R. 76.
[4] Cal. Pen. Code, sec. 240.
[5] Johnson v. Thompkins, 1 Baldw. 571, 600.

ing the fist at him, or presenting a gun or other weapon within such a distance as that a hurt might be given, or drawing a sword and brandishing it in a menacing manner, provided the act is done with intent to do some corporal hurt.[1] The drawing of a pistol on another, accompanied by a threat to use it unless the other immediately leave the spot, is an assault, although the pistol is not pointed at the person threatened.[2] Cocking and raising a gun, and threatening to shoot a person, when the act indicates an intention to shoot;[3] or raising a club over the head of a woman within striking distance, and threatening to strike her if she opens her mouth, are assaults.[4] So also to double the fist and run it at another, saying: "If you do that again I will knock you down."[5] So the mere taking hold of the coat, or laying the hand gently on the person of another, if done in anger, or in a rude and insolent manner, or with a view to hostility, amounts not only to an assault, but to a battery.[6]

§ 1623. **Assault and Slander.**—A plaintiff may aver in his complaint all that took place at the time, though a part constitute an assault, and part a slander, and recover damages which he has sustained for the compound injury.[7]

§ 1624. **Avoiding Injury.**—To recover damages for an assault and battery, it is not necessary that the plaintiff should have fled to avoid the injury, if he used ordinary care to prevent injury, and it ensued from the wrongful act of the defendant.[8]

§ 1625. **Battery Defined.**—A battery is any willful and unlawful use of force or violence upon the person of another.[9] A battery is the touching or commission of any actual violence on the person of another in a rude and angry manner.[10]

§ 1626. **Damages.**—In cases of aggravated assault, the jury are permitted to give exemplary or punitive damages.[11] An employer, though not present, and in no manner consenting to or aiding the assault, is liable for the actual damage sustained

[1] United States v. Ortega, 4 Wash. C. Ct. 584; United States v. Hand, 2 Id. 435.

[2] People v. McMakin, 8 Cal. 547.

[3] United States v. Kierman, 3 Cranch C. Ct. 435.

[4] United States v. Richardson, 5 Cranch C. Ct. 348.

[5] United States v. Meyers, 1 Cranch C. Ct. 310.

[6] United States v. Ortega, 4 Wash. C. Ct. 584.

[7] Brewer v. Temple, 15 How. Pr. 286.

[8] Heady v. Wood, 6 Ind. 82.

[9] California Penal Code, sec. 242.

[10] Johnson v. Tompkins, 1 Baldw. 571, 600.

[11] Drohn v. Brewer, 77 Ill. 280; 33 Mich. 49; Wilson v. Middleton, 2 Cal. 54; Wade v. Thayer, 40 Id. 578; see also Wheaton v. N. B. & M. R. R. Co., 36 Id. 590; Shea v. P. & B. V. R. R. Co., 44 Id. 414.

in an assault upon the person, committed by his servants or employees, while in the performance of their duties as such.[1]

§ 1627. **Malice.**—The language of the defendant while committing the assault is admissible in evidence, for the purpose of characterizing the act as bearing on the question of malice.[2]

§ 1628. **Assault by Master of Vessel.**—A master or commander of a vessel is, in general, not liable to an action for assault and battery, for chastisement inflicted upon a seaman or marine, where he acted under a sincere conviction that it was necessary to enforce discipline or compel obedience to orders, and not from passion or revenge.[3] So, where a master, believing there is immediate danger of mutiny, makes use of a dangerous or deadly weapon to reduce a seaman, actually in mutiny, to obedience, he is not liable.[4] Seamen are generally entitled to recover damages for an assault and battery from the officer of a ship: 1. Where a personal violence is inflicted wantonly, and without provocation or cause; 2. Where there was provocation or cause, but the punishment was cruel or excessive; 3. Usually where the punishment is inflicted with a dangerous or deadly weapon.[5]

§ 1629. **Principal.**—One who is present and encourages an assault and battery is a principal.[6]

§ 1630. **Provocation.**—No words of provocation will justify an assault, although they may constitute a ground for the reduction of damages.[7]

§ 1631. **Where Action Lies.**—Assault and battery will lie against a steamboat, for an assault and battery committed by the mate or other officer of the boat, on the person of a passenger, while such boat is being navigated on the rivers within or bordering on the state.[8] Assault and battery lies for injury to the relative, as for beating, wounding and imprisoning a wife or servant, by which the plaintiff has sustained a loss.[9] So where

[1] Wade v. Thayer, 40 Cal. 578.

[2] McDougall v. McGuire, 35 Cal. 274.

[3] Dinsman v. Wilkes, 12 How. U. S. 390; compare United States v. Freeman, 4 Mason, 505; Thompson v. Busch, 4 Wash. C. Ct. 338.

[4] Roberts v. Eldridge, 1 Sprague, 54; United States v. Colby, Id. 119; United States v. Lunt, Id. 311. As to what will justify corporal punishment of seamen, see Morris v. Cornell, 1 Sprague, 62; Payne v. Allen, Id. 304; Sheridan v. Furbur, 1 Blatchf. & H. 423.

[5] Forbes v. Parsons, Crabbe, 283. compare Dinsman v. Wilkes, 12 How. (U. S.) 390. For the law governing such liability, see U. S. Rev. Stat. at L., sec. 5347.

[6] Coats v. Darby, 2 Comst. 517; 5 Ohio, 250; United States v. Ricketts, 1 Cranch C. Ct. 164.

[7] Cushman v. Ryan, 1 Story, 91.

[8] Lay v. Steamboat etc., 28 Ill. 472.

[9] 9 Co. 113; 10 Id. 130; Bland v. Drake, 1 Chit. 167. When not under the color of process, see 11 Mod. 180; Schmeider v. McLane, 36 Barb. 495.

the battery, imprisonment, etc., were in the first instance lawful, but unnecessary violence was used.[1] One is guilty of assault and battery who delivers to another a thing to be eaten, knowing that it contains a foreign substance — as cantharides — and concealing the fact, if the other, in ignorance of the fact, eats it, and is injured in health.[2] Acts *mala prohibita* do not become *mala in se*, unless done willfully and corruptly. One who drives over another in negligence merely, is not rendered guilty of a criminal assault and battery by the fact that he does so while violating a city ordinance against fast driving.[3]

§ 1632. **Willful, Malicious.**—It is not necessary in an action for a simple assault and battery to charge in terms that it was "willful" or "malicious," to entitle the plaintiff to maintain his action.[4]

§ 1633. **The Same—Short Form.**

Form No. 414.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at the ....., the defendant assaulted and beat him, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1634. **Married Woman, Allegation of Assault by.**

Form No. 415.

That on the ..... day of ....., 18..., the defendant C. E., she being then, as now, the wife of the defendant E. F. [continue as in preceding form].

§ 1635. **The Same—With Special Damages.**

Form No. 416.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of....., 18...., at ....., the defendant assaulted and beat the plaintiff until he became insensible.

II. That the plaintiff was thereby disabled from attending to his business for weeks thereafter, and was compelled to pay .... dollars for medical attendance, and has been ever since disabled [from using his left arm; or otherwise state the damage, as the case may be], to his damage .....dollars.

[DEMAND OF JUDGMENT.]

[1] 1 Ch. Pl. 167; Pease v. Burt, 3 Day, 485; Elliott v. Brown, 2 Wend. 497; Boles v. Pinkerton, 7 Dana, 453; Hanner v. Estes, 15 Mass. 347; Bennett v. Apleton, 25 Wend. 371.

[2] Commonwealth v. Stratton, 114 Mass. 303.

[3] Commonwealth v. Adams, 114 Id. 323.

[4] Andrews v. Stone, 10 Minn. 72.

§ 1636. **Against a Corporation for Damages Caused by an Assault and Forcible Ejection from a Car.**

Form No. 417.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the defendant was, and now is a corporation, duly organized under and pursuant to the laws of this state, and was the owner of a certain railroad known as the .... railroad, with the track, cars, and other appurtenances thereunto belonging, and was a common carrier of passengers from ..... to .....

II. That on the ..... day of ....., 18.., at ....., the defendant with unnecessary violence assaulted the plaintiff and forcibly ejected him from one of its cars.

III. That the plaintiff was thereby disabled from attending to his business for . ..... weeks thereafter, and has ever since been disabled from using [his left foot or otherwise], and was compelled to pay ..... dollars for medical attendance, to the damage of the plaintiff ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1637. **Conductor of Car.**—The right of a car conductor on a railroad to expel a passenger for non-payment of the fare, must be exercised in such a manner as is consistent with the safety of the passenger's life. He must first stop the car, and if he attempts to eject him without stopping the car, the passenger has the same right to repel the attempt that he has to resist a direct attempt to take his life.[1] Although a person may be wrongfully upon the cars, the conductor must use reasonable care and prudence in removing him.[2]

§ 1638. **Corporation.**—An action of trespass for assault and battery will lie against a corporation, if it has power to authorize the act done, and has done so; and a servant of the company may be joined as a defendant. [3]

§ 1639. **Damages.**—In cases of injury to the person from negligence of the conductor of a car, the law does not prescribe any fixed or definite rule of damages, but from necessity leaves their assessment to the good sense and unbiased judgment of the jury.[4]

§ 1640. **Exemplary Damages.**—A railroad company may be charged with exemplary damages for injuries done with force or malice to a passenger by a conductor of said company.[5]

[1] See Sanford v. Eighth Avenue R. R. Co., 23 N. Y. 343.

[2] Kline v. C. P. R. R. Co., 37 Cal. 400.

[3] Brokaw v. N. J. R. & T. Co., 3 Vroom, 328.

[4] Aldrich v. Palmer, 24 Cal. 513; cited in Wheaton v. N. B. & M. R. R. Co., 36 Id. 590.

[5] Baltimore & Ohio R. R. Co. v. Blocher, 27 Md. 277.

§ 1641. **Master and Servant.**—The master is liable for the servant, if he acts within the scope of his authority.[1] The relation of conductor on a car and the company for whom he is acting as conductor is that of master and servant, and the relation being established, all else is mode and manner, and as to that the master is responsible.[2]

§ 1642. **Forcible Ejection.**—If a person be of mature years, the mere words of the driver, ordering him to get off, could not be regarded as a forcible ejection of the plaintiff from the car at a time when it was dangerous to leave it; but if a child of ten years of age was so ordered, his obedience would be naturally expected, without regard to the risk he might incur, and in respect to a child so young the command would be equivalent to compulsion.[3]

§ 1643. **Mutual Negligence.**—If the plaintiff be in the wrong, yet if his wrong or negligence is remote—that is, does not immediately accompany the transaction from which his injury resulted—the defendant can not excuse himself on the score of mutuality, nor absolve himself from his obligation to exercise reasonable care and prudence in what he may do.[4] So the entry on a car, if an accomplished fact, is only a remote cause of the injury inflicted by a subsequent ejection from the car; nor did it absolve the conductor from the duty of observing reasonable care and prudence in putting him off the train.[5] Mutual or co-operating negligence, which deprives one party of any right of action against the other, is when the act which produced the injury would not have occurred but for the combined negligence of both. But where the negligence of one party would produce injury in any event, with or without the negligence of the other, then it becomes a mere question of adjustment of damages.[6] Where negligence exists on both sides, that of the plaintiff must have contributed to the injury, or it will not excuse the defendant.[7]

§ 1644. **Removing Trespassers.**—A man can not lawfully push another off from his land without first requesting him to get off.[8] But mechanics in charge of a house which they are

[1] Kline v. C. P. R. R. Co., 37 Cal. 400.

[2] Id.

[3] Lovett v. Salem & South Danvers R. R. Co., 9 Allen (Mass.). 561; cited in Kline v. Central Pacific R. R. Co. of Cal., 37 Cal. 400; where it goes on to state: "We have no doubt that in case a show or demonstration of force sufficient to impress a reasonable person with the belief that it will be employed, must be held to be the equivalent of actual force."

[4] Kline v. C. P. R. R. Co., 37 Cal. 400.

[5] Id.

[6] Thomas v. Kenyon, 1 Daly, 132.

[7] Haley v. Earle, 30 N. Y. 208.

[8] Thompson v. Berry, 1 Cranch C. Ct. 45.

building have a right to remove gently persons coming into the building without authority, if they will not depart upon request.[1] The abuse of legal authority which will make a person a trespasser *ab initio*, is the abuse of some special and particular authority given by law; and the doctrine does not apply to the case of an agent in a factory who uses improper force in ejecting a disorderly person employed there.[2]

§ 1645. **Assault and False Imprisonment—Short Form.**

Form No. 418.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., the defendant assaulted and beat the plaintiff, and imprisoned him for ..... hours, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1646. **Arrest.**—The circumstances of the arrest should not be set out in the complaint. If so set forth, they may be stricken out upon motion.[3]

§ 1647. **Circumstances.**—Allegations of the circumstances in detail on a charge of false imprisonment and assault, in connection with an illegal combination and conspiracy, were allowed in a great measure to stand.[4]

§ 1648. **The Same—Fuller Form.**

Form No. 419.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., the defendant assaulted the plaintiff, and charged him with [state what offense], and gave him into the custody of a policeman, and forced and compelled him to go to a police station, and there caused him to be imprisoned, and caused him to be kept in prison for a long time, until he was afterwards brought in custody before one of the police magistrates of ....., and the defendant then again charged him with the said offense; but the said magistrate dismissed the said charge, and caused him to be discharged out of custody.

II. That the plaintiff thereby suffered damage in the amount of .....dollars.

[DEMAND OF JUDGMENT.]

[1] United States v. Bartle, 1 Cranch C. Ct. 236.

[2] Esty v. Wilmot, 15 Gray, 168.

[3] Eddy v. Beach, 7 Abb. Pr. 17; Shaw v. Jayne, 4 How. Pr. 119

[4] Molony v. Dows, 15 How. Pr. 261.

CHAPTER II.

FOR FALSE IMPRISONMENT.

§ 1649. **Common Form.**

Form No. 420.

[TITLE]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at....., the defendant imprisoned him for ..... days [or hours, as the case may be], without probable cause [state special damages, if any], to the damage of the plaintiff.....dollars.

[DEMAND OF JUDGMENT.]

§ 1650. **Arrest without Proof.**—A person who without bad faith or malice has, upon oath, or otherwise, merely stated his case to a magistrate having jurisdiction of the offense supposed to have been committed, and of the person accused, is not liable to an action for false imprisonment upon the consequent arrest of the accused, al hough such arrest is not warranted by the law or the facts in the case.[1]

§ 1651. **Circumstances of Arrest.**—The particular instrumentality by which the plaintiff was deprived of his liberty should not be set out in the complaint. If the circumstances of the arrest are set forth, they may be struck out upon motion.[2]

§ 1652. **Corporation.**—A corporation may be sued in trespass for false imprisonment.[3]

§ 1653. **Election of Remedy.**—A plaintiff has an election of remedy between an action for false imprisonment and malicious prosecution, where either form is admissible.[4]

§ 1654. **False Imprisonment Defined.**—False imprisonment is the unlawful violation of the personal liberty of another.[5] As a crime, false imprisonment is not a felony under the laws of California.[6]

§ 1655. **False Imprisonment, What It Avoids.**—One who obtains possession of personal property by threat of wrongful

[1] Von Latham v. Libby, 38 Barb. 339; citing Carratt v. Morely, 1 A. & E. (N. S.) 18; Barber v. Rollinson, 1 C. & M. 350; West v. Smallwood, 3 M. & W. 418; 6 Man. G. & S 365; 22 Wend. 552; and disapproving Comfort v. Fulton, 13 Abb. Pr. 276; Livingston v. Burroughs, 33 Mich. 511.

[2] Eddy v. Beach, 7 Abb. Pr. 17; Shaw v. Jayne, 4 How. Pr. 119. As to what extent such allegations are allowed to stand, see Molony v. Dows, 15 Id. 266.

[3] Owsley v. Montgomery & W. P. R. R. Co., 37 Ala. 560.

[4] Von Latham v. Libby et al., 38 Barb. 339; 17 Abb. Pr. 237; Brown v. Chadsey, 39 Barb. 253.

[5] Cal. Pen. Code, sec. 236.

[6] People v. Ebner, 28 Cal. 158.

imprisonment acquires no title, and such transaction is void.[1] Error of judgment on the part of the magistrate will not render the process issued by him void.[2]

§ 1656. **Malice.**—Malice and falsehood are essential ingredients in an action for malicious prosecution, but are not essential to an action for false imprisonment, in which, however, the element of want of probable cause is necessary.[3]

§ 1657. **Principal and Agent.**—Where a private person takes any part in the unlawful imprisonment of another, he becomes a principal in the act, and is liable for the trespass; but where he merely communicates facts or circumstances of suspicion to officers, leaving them to act upon them on their own judgment and responsibility, he is not liable.[4] A shopkeeper is not liable for the act of his superintendent and clerks, in calling a policeman and causing the arrest and search of a woman suspected of stealing goods, if done without his authority, express or implied.[5]

§ 1658. **Sufficient Averment.**—In order to sustain a charge for false imprisonment, it is not necessary for the plaintiff to show that the defendant used violence, or laid hands on him, or shut him up in a jail or prison; but it is sufficient to show that the defendant, at any place or time, in any manner restrained the plaintiff of his liberty, or detained him in any manner from going where he wished, or prevented him from doing what he desired.[6]

§ 1659. **Void Process.**—One who procures the arrest and imprisonment of another upon void process, is liable in an action for false imprisonment; and mere good faith in making the affidavit by virtue of which the arrest is made, is no defense.[7]

§ 1660. **Want of Jurisdiction.**—Where one is arrested, tried, and convicted of an act which, if it were an offense, was one of which the court had no jurisdiction, his imprisonment can not afterwards be justified by showing that the evidence at the trial would have convicted him of another offense which was triable in that court.[8]

§ 1661. **Where and When Action Lies.**—Though the original arrest be warrantable, an action for false imprisonment lies for any subsequent oppression or cruelty.[9] Action for ma-

[1] Richards v. Vanderpoel, 1 Daly, 71.

[2] Von Latham v. Libby, 38 Barb. 339; 17 Abb. Pr. 237.

[3] Platt v. Niles, 1 Edm. 230.

[4] 7 Car. & P. 373; Burns v. Erben, 26 How. Pr. 273; Brown v. Chadsey 39 Barb. 253.

[5] Mali v. Lord, 39 N. Y. 381.

[6] Hawk v. Ridgway, 33 Ill. 473.

[7] Painter v. Ives, 4 Neb. 122; Hallock v. Dominy, 14 N. Y. Sup. Ct. 52; Sheldon v. Hill, 33 Mich. 171.

[8] Wait v. Green, 5 Park. Cr. 185.

[9] 1 T. R. 536; Esp. Dig. 332; Doyle v. Russell, 30 Barb. 300.

licious prosecution require different rules, both of pleading and evidence, and are essentially distinct.[1] Where imprisonment only is complained of, the action is for false imprisonment.[2]

§ 1662. **Who Liable.**—Where a person has been arrested upon a criminal charge, without any competent evidence of his guilt, the magistrate and prosecutor are jointly liable to an action for false imprisonment.[3]

§ 1663. **The Same—Another Form.**

Form No. 421.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of .. .., 18..., at ....., the defendant, by force, compelled the plaintiff to go with him to the police office [or otherwise], and there imprisoned him, and then and there detained him restrained of his liberty for the space of ..... days, without probable cause and without any right or authority so to do, and against the will of the plaintiff; whereby the plaintiff was bruised and wounded, and was also injured in his credit, and was prevented from attending to his business during that time, and was compelled to pay ..... dollars for costs and counsel fees in obtaining his discharge, to his damage ..... dollars.

[Demand of Judgment.]

§ 1664. **Special Damage.**—Allegation of special damage by reason of the imprisonment may be inserted in the complaint.[4] In an action for false imprisonment against a justice of the peace, it was held that the plaintiff could not recover in damages the amount of costs incurred by him in an unsuccessful application for his discharge on a writ of *habeas corpus*, such costs not having been alleged as special damages in the complaint.[5]

[1] Brown v. Chadsey, 39 Barb. 253.

[2] Burns v. Erben, 26 How. Pr. 273.

[3] Comfort v. Fulton, 13 Abb. Pr. 276. But see, for qualification of this statement, Von Latham v. Libby, 38 Barb. 339.

[4] Molony v. Dows, 15 How. Pr. 266. But in the same case allegations of aggravating circumstances were struck out.

[5] Spence v. Nevnell, 2 New Mag. Cas. 19; *contra*, Williams v. Garrett, 12 How Pr. 456.

CHAPTER III.

LIBEL AND SLANDER.

§ 1665. For Libel—The Words being Libelous in Themselves.

Form No. 422.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the.....day of ....., 18..., at ....., the defendant published a newspaper called the ..... [or in a letter addressed to C. D.], the following words of and concerning the plaintiff [set forth the words used.]

II. That the said publication was false and defamatory.

III. That by means of said false and defamatory publication the plaintiff was injured in his reputation, to his damage..... dollars.

[DEMAND OF JUDGMENT.]

§ 1666. Allegations Material.—The material allegations in an action of libel, where words are defamatory on their face, and in the English language, are: (First) That the defendant with malice or wrongfully (Second) published, (Third) of and concerning plaintiff, (Fourth) these false words. In slander, instead of alleging, (Second) "published," it is customary to allege "that he spoke in the presence and hearing of divers persons,"[1] although the word "published" imports *ex vi termini*, a speaking in the presence and hearing of somebody.[2] From a libel, damage is always implied by law; whereas some kinds of slander only are actionable without proof of special damage.[3]

§ 1667. The Same—Concerning the Plaintiff.—In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish on the trial that it was so published or spoken.[4]

[1] Wood v. Gilchrist, 1 Code Reporter, 117; Anon., 3 How. Pr. 405.

[2] Duel v. Agan, 1 Code Reporter, 134; see also Lettman v. Ritz, 3 Sandf. 734; and Debaix v. Lehind, 1 Code R., N. S., 255.

[3] Broom's Com. 513.

[4] Cal. Code C. P., sec. 460; see also N. Y. Code of 1877, sec. 535; Laws of Oregon, sec. 88; 1 Whitt. Pr. 697; Van Santv. 271.

§ 1668. **The Same—Intent—Motive.**—There may or may not be any intent, good or bad; but intent or no intent, the liability is for the act and its consequences, not for the intent. The usual ground upon which the liability is placed, is that the law presumes every one to intend the necessary and natural consequences of his acts.[1]

The intent with which the action is done is by no means the test of liability of a party to an action of trespass.[2] *Bona fides* will not protect a magistrate who does an illegal act.[3] It is immaterial with what motive a man does an unlawful act.[4] So an assault and battery committed with a purpose to ridicule the plaintiff or bring him into contempt, partakes of the nature of libel; and in order to recover damages for the injury to reputation, as well as for that to the person, the complaint should be for assault and battery, but should aver intent to defame, and injury to reputation, in addition to the usual averments in actions for assault and battery.[5] Thus, averments of the business of the parties, that the assault was for the purpose of compelling the plaintiff to give up his business, and of bringing him into disgrace and ridicule, and that the assault, etc., caused him to be ridiculed by, etc., though not essential to a cause of action, are not immaterial. The motives and intent, and the consequences resulting, are material on the question of damages.[6]

§ 1669. **The Same—Language Set Out.**—The complaint should set out the very words published.[7] The true term to be used to indicate that the very words are set forth is "tenor."[8] It is not enough to state its purport;[9] and when the words were published in a foreign language, the foreign words must be set forth in the original,[10] together with a translation into English.[11] To set forth the foreign words alone, or their translation alone, is not sufficient.[12] The rule that the exact language

[1] Haire v. Wilson, 9 B. & Cr. 643; Viele v. Gray, 10 Abb. Pr. 1; 1 Esp. N. P. Cases, 225; Root v. King, 7 Cow. 613.

[2] Guille v. Swan, 19 Johns. 381; Percival v Hickey, 18 Id. 257; Tremain v. Cohoes Co., 2 Comst. 164; Safford v. Wycoff, 1 Hill, 11.

[3] Prickett v. Greatrex, 1 New Mag. Cas 544; 7 Law Times, 139.

[4] Amick v. O'Hara, 6 Blackf. (Ind.) 258.

[5] Compare Sheldon v. Carpenter, 4 N Y. 579; Watson v. Hazzard, 3 Code R. 218.

[6] Root v. Foster, 9 How. Pr. 37.

[7] Wesley v. Bennett, 5 Abb. Pr. 498; Rundel v. Butler, 7 Barb. 260; Forsyth v. Edmiston, 2 Abb. Pr. 430; Finnerty v. Barker, 7 N. Y. Leg. Obs. 317; Sullivan v. White, 6 Irish Law R. 40; Whitaker v. Freeman, 1 Dev. 271; Lee v. Kane, 6 Gray (Mass.), 495; Taylor v. Moran, 4 Met. (Ky.) 127; Commonwealth v. Wright, 1 Cush. 46.

[8] Commonwealth v. Wright, 1 Cush. 46; Wright v. Clements, 3 B. & Ald. 503

[9] Wood v. Brown, 6 Taunt. 169; S. C. 1 Eng. Com. Law, 560.

[10] Zenobia v. Axtell, 6 T. R. 162.

[11] Townshend on Slan. and Lib. 412.

[12] Warmouth v. Cramer, 3 Wend. 394; Lettman v. Ritz, 3 Sandf. 734;

used should be set out does not render it necessary to set forth the whole of the matter published,[1] but an extract of the particular passage complained of.[2]

§ 1670. **Malice is Presumed.**—When the words published are unambiguous, and not capable of being understood in any other sense than as defamatory to an extent that must necessarily expose the plaintiff to contempt and ridicule, they are by implication of law malicious. It is not necessary to allege in the complaint that the publication was false and malicious. Such an allegation, though common and quite proper, is a mere matter of form, the lack of which is no objection to a pleading.[3] That the words are "libel" is a sufficient allegation of falsehood and malice.[4] So a general averment of malice is sufficient.[5] In an action for libel, it is not indispensable to use the word "maliciously" in the declaration. It is sufficient if words of equivalent power or import are used.[6]

§ 1671. **Malice, how Averred.**—Any form of words from which malice [absence of excuse] can be inferred, as that the publication was made falsely or wrongfully, will suffice.[7] For one meaning of malice is absence of legal excuse.[8] And a pleading may be sufficient without an special averment of malice.[9] So a declaration which charged the publication to be "malicious, injurious, and unlawful" was held sufficient.[10] The averments usual in old precedents, that the defendant, well knowing the premises, etc., maliciously intending to injure the plaintiff, etc., and to bring him into great scandal and disgrace, and to cause it to be believed that the plaintiff had been guilty, are superfluous.[11] So, also, that the defendant, on, etc., falsely and maliciously published, etc., the false, malicious, scandalous and defamatory matter following, is unnecessary. An allegation that the publication was a libel has been held equivalent to an allegation that it was false and malicious.[12] In all cases where the facts are within the knowledge of the defendant, or the statement involved is in itself libelous, a general allegation

Keenholts v. Becker, 3 Den. 346; 12 Ind. 453; Hickley v. Grosjean, 6 Blackf. 351; Rahauser v. Schwerger Barth, 3 Watts, 28.

[1] Devo v. Brundage, 13 How. Pr. 221; Culver v. Van Anden, 4 Abb. Pr. 375; Rex v. Brereton, 8 Mod. 329.

[2] Cheetham v. Tillotson, 5 Johns. 430.

[3] Hunt v. Bennett, 19 N. Y. 173; Root v. King, 7 Cow. 620.

[4] See above authorities, and Fry v. Bennett, 5 Sandf. 54; Viele v. Gray, 18 How. Pr. 550.

[5] Purdy v. Carpenter, 6 How. Pr. 361.

[6] White v. Nichols, 3 How. U. S. 266.

[7] Townshend on Slan. and Lib. 410.

[8] Id. 85.

[9] Opdyke v. Weed, 18 Abb. Pr. 228, notes.

[10] Rowe v. Roach, 1 Mau. & S. 304.

[11] Coleman v. Southwick, 9 Johns. 45.

[12] Hunt v. Bennett, 19 N. Y. 176.

of malice will be sufficient without any statement of facts and circumstances.[1] So express malice, or want of probable cause need not be averred.[2]

§ 1672. **Malice, when not Implied.**—Under the statute of New York and other states, in actions against reporters, editors, and proprietors of newspapers for an alleged libel in the report of any judicial, legislative, or other public official proceeding, or of any statement, speech, argument, or debate in the course of the same, malice in publishing the report is not implied by the publication.[3] An accurate report in a newspaper of a debate in parliament, containing matter disparaging an individual is not actionable. The publication is privileged on the ground that the advantage of publicity to the community outweighs any private injury; and comments in the newspaper on the debate are so far privileged that they are not actionable so long as they are honest, fair, and justified by the circumstances disclosed in the debate.[4]

§ 1673. **Proprietor and Publisher, Liability of.**—In a complaint for libel it is a sufficient allegation of its publication by the defendant to allege that he was the proprietor of a newspaper in which it was published, without otherwise alleging that he published it, or was concerned in its publication.[5] A receiver of a newspaper concern, pending a suit to settle the partnership accounts of its proprietors, will be personally responsible for any publication therein which is improper, although the order of his appointment directs that the defendants may continue to superintend the editorial department.[6] But the assignee of a newspaper establishment, as a collateral security, is not liable for a libel published in it.[7]

§ 1674. **Publication, Averment of.**—Every communication of language from one to another is a publication; but to constitute an actionable publication it is essential that there be a publication to a third person, and the husband or wife of either author or publisher, or of the one whom or whose affairs the language concerns, is regarded as a third person.[8] A statement

[1] Viele v. Gray, 10 Abb. Pr. 1; Howard v. Sexton, 4 Comst. 157; Buddington v. Davis, 6 How. Pr. 401.

[2] Purdy v. Carpenter, 6 How. Pr. 301; Littlejohn v. Greeley, 13 Abb. Pr. 41.

[3] See Sandford v. Bennett, 24 N. Y. 20.

[4] Wason v. Walter, Law Rep. 4 Q. B. 73; see also Ackerman v. Jones, 37 N. Y. Supr. Ct. (5 J. & Sp.) 42.

[5] Hunt v. Bennett, 19 N. Y. 173; affirming S. C., 4 E. D. Smith, 647.

[6] Marten v. Van Schaick, 4 Paige Ch. 479.

[7] As to the general doctrine respecting the liability of publishers and proprietors of newspapers, booksellers, etc., see 2 Greenl. Ev., sec. 416; 2 Stark. on Slander, 28-34; 1 Carter (Ind.) 344.

[8] Townshend's Slan. and Lib. 90.

that the defendant was proprietor of a newspaper, and that the words were published therein, is a sufficient averment of publication.[1] The publication must be alleged, but it need not be set forth in any technical form of words;[2] but it must be alleged positively, and not by way of recital.[3] The word "published" is the proper and technical term by which to allege publication,[4] but any equivalent allegation will suffice.[5] But to allege that defendant composed, wrote, and delivered a certain libel addressed to the plaintiff, was held insufficient.[6] That defendant sent a letter to plaintiff, which was received and read by him, does not show a sufficient publication;[7] it is necessary to allege that it was in fact seen or read (by others).[8] So where the writer reads to a stranger his letter to the plaintiff, before dispatching it, it is a publication.[9]

§ 1675. **Libel and Slander—Definition of.**—Slander or libel is an infringement of the absolute rights of persons, as the character of persons is undoubtedly one of their absolute and personal rights.[10] A libel is a written or printed slander.[11] Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.[12] Libel is both a public wrong or crime, and a private wrong or tort, cognizable by the common law. The remedy for the public wrong is by indictment or criminal information. The remedy for the private wrong is a civil action now known as an action or the action of or for libel.[13] The rule is generally laid down that a publication is libelous when its necessary effect is to diminish the plaintiff's reputation for respectability, impair his condition, and abridge his comforts, by exposing him to disgrace and ridicule.[14] In

[1] Hunt v. Bennett, 4 E. D. Smith, 647; affirmed 19 N. Y. 173.

[2] Baldwin v. Elphinston, 2 W. Black. 1037.

[3] Donaghe v. Rankin, 4 Munf. 261.

[4] Stark on Slan. 359.

[5] Townshend Slan. and Lib. 408; Baldwin v. Elphinston, 2 W. Black. 1037; Waisted v. Holman, 2 Hall, 172; Hunt v. Bennett, 4 E. D. Smith. 647.

[6] Waistel v. Holman, 2 Hall, 172.

[7] Lyle v. Clason, 1 Cai. 581.

[8] Giles v. The State, 6 Ga. 276.

[9] Snyder v. Andrews, 6 Barb. 43; M'Combs v. Tuttle, 5 Blackf. 431; Van Cleef v. Lawrence, 2 City Hall Recorder, 41.

[10] Holt on Libel, 15.

[11] 1 Hillard on Torts, c. 7, 32.

[12] Cal. Civ. Code, sec. 45; see, also, Cal. Pen. Code, sec. 248; Gage v. Robinson, 12 Ohio, 250; Fisher v. Patterson, 14 Id. 418.

[13] Townshend on Slander and Libel, 22.

[14] Hunt v. Bennett, 4 E. D. Smith 647. For definition of libel, see Townshend on Slander and Libel, 31; Burr. Law Dict.; 1 Hill on Torts, c. 8, 313; Holt on Libel, 213; 1 Mence on Libel, 125; Steele v. Southwick, 9 Johns. 214; Cooper v. McElrath, 1 Den. 347; 3 How. U. S. 266; Armentrout v. Miranda, 8 Blackf. 426; 4

every slander there are two acts, composing and publishing. In every libel there are three acts, composing, writing and publishing. So every publication of language concerning a man or his affairs, which as a necessary or natural and proximate consequence occasions pecuniary loss to another, is *prima facie* a slander, if the publication be oral; and a libel if it be by writing.[1]

§ 1676. **Gist of Action.**—Pecuniary loss to the plaintiff is the gist of the action for slander or libel.[2] If the language published has not occasioned the plaintiff pecuniary loss, actual or implied, no action can be maintained. And actual loss must be shown to have been sustained.[3] Whether or not matter is libelous so as to be actionable, depends upon the style, scope, spirit, and motive of the publication, taken in its entirety, and the inquiry is into the natural effect of it, not only upon the public generally, but upon the neighbors and friends of the person aimed at.[4]

§ 1677. **Joinder of Causes of Action and Parties.**—It would seem that plaintiff may unite in one complaint a cause of action for slander with a cause of action for libel, or for malicious prosecution.[5] But a cause of action in a plaintiff singly for slander of him in his partnership business can not be joined with a cause of action in him and his partners jointly.[6] And where a complaint contains several causes of action, each must be separately stated and numbered,[7] and must be complete in itself.[8] Where several are included in the same libel, they may each maintain a separate action for the injury.[9] An action of libel lies against two or more, if the act be joint and done by all.[10] Where a publication affects a class of persons, no individual of that class can maintain an action.[11] In libel, all who can concur in the publication may be sued together, though the general rule is otherwise as to slander, as words uttered by one are not the words of another.[12] But if one repeats, and another writes, and

Mass. 115; Id. 163, 167; McCord, 317; Carey v. Allen, 39 Wis. 482; Hand v. Winton, 38 N. J. L. 122; Byers v. Martin, 2 Col. T. 605; Williams v. Godkin, 5 Daly, 499.

[1] Townshend's Slander and Libel, 68.

[2] Id. 57.

[3] Borthwrich on Libels, 4.

[4] Moffatt v. Cauldwell, 3 Hun, 26; Sanderson v. Caldwell, 45 N. Y. 598.

[5] Martin v. Mattison, 8 Abb. Pr. 3; Hull v. Vreeland, 42 Barb. 543; 3 Bing. (N. C.) 950. Or for slander of title: Cousins v. Merrill, 16 Up. Can. C. P. Rep. 114.

[6] Robinson v. Marchant, 7 Q. B. 918.

[7] Pike v. Van Wormer, 5 How. Pr. 171.

[8] Holton v. Muzzy, 30 Vt. 365; Sinclair v. Fitch, 3 E. D. Smith, 659; see p. 395, note 11.

[9] Smart v. Blanchard, 42 N. H. 137.

[10] Thomas v. Rumsey, 6 Johns. 26; Glass v. Stewart, 10 Serg. & R. 222.

[11] White v. Delavan, 17 Wend. 49; but see Ryckman v. Delavan, 25 Id. 186.

[12] Forsyth v. Edmiston, 2 Abb. Pr. 430.

a third approves what is written, all are liable.[1] Partners may sue for libel upon them, in respect to their business, but can recover only for injury to their firm.[2] For a libel on partners, all the partners may sue together.[3]

§ 1678. **Privileged Communications.**—As examples of communications which have held to be privileged are a memorial to the postmaster-general, charging fraud against a successful candidate for a contract.[4] A physician granting a certificate of lunacy, pursuant to statute.[5] A charge preferred by one member of a lodge against another.[6] Words spoken or written in a legal proceeding, pertinent and material to the subject of the controversy are privileged.[7] A written communication from a banker in the country to a mercantile firm in the city, in respect to the pecuniary responsibility of a party whose note had been forwarded for collection.[8] The withdrawal by an employer of a former recommendation of a discharged employee is privileged, unless it is shown to be malicious.[9] The publication of a slander by a murderer at the time of his execution is not privileged.[10] So proceedings before a grand jury are not privileged.[11] The comments on privileged communications are not protected, if libelous themselves.[12] The defendant, in a privileged communication described the plaintiff's conduct as "most disgraceful and dishonest." The conduct so described was equivocal, and might honestly have been supposed by the defendant to be as he described it; it was held that the above words were not of themselves evidence of actual malice.[13]

§ 1679. **Satire.**—The distinction between the satirist and the libeler is that one speaks of the species. the other of the individual.[14] So an action for libel will only lie upon words concerning distinguishable persons, and can not be brought upon words which relate to a class or order of men.[15] But it must be

[1] Thomas v. Rumsey, 6 Johns. 26.
[2] Taylor v. Church, 1 E. D. Smith, 279.
[3] Taylor v. Church, 4 Seld. 452; see S. C., 1 E. D. Smith, *supra*.
[4] Cook v. Hill, 3 Sandf. 341; Buddington v. Davis, 6 How. Pr. 401.
[5] Perkins v. Mitchell, 31 Barb 461.
[6] Streety v. Wood, 15 Barb. 105.
[7] Garr v. Seldon, 4 Comst. 91; Perkins v. Mitchell, 31 Barb. 461.
[8] Lewis v. Chapman, 16 N. Y. 369; reversing same case, 19 Barb. 252.
[9] Fowles v. Bowen, 30 N. Y. 20.
[10] Sanford v. Bennett, 24 N. Y. 20.
[11] McCabe v. Cauldwell, 18 Abb. Pr. 377.
[12] Edsall v. Brooks, 26 How. Pr. 426; 17 Abb. Pr. 221.
[13] Spill v. Maule, L. R. 4 Exch. 232. For additional communications which are deemed privileged, see Ackerman v. Jones, 37 N. Y. Supr. (5 J. & Sp.) 42. As to liability of proprietors of a mercantile agency for statements respecting the financial standing and credit of a merchant, see Sunderlin v. Bradstreet, 46 N. Y. 188, where it is held they are liable for a false report, though made in good faith. For a case depending upon special facts, see Klinck v. Colby, 46 N. Y. 427.
[14] Joseph Andrews, vol. 2, p. 5.
[15] Sumner v. Buell, 12 Johns. 475.

manifest upon the face of the publication that the charges made were intended against a class, profession, or order of men, and can not by possibility impart a personal application tending to private injury.[1]

§ 1680. **Special Damages.**—Those damages which are not the necessary consequence of the language complained of must be specially alleged in the complaint.[2] But a complaint in an action for words in writing charging insanity need not allege special damage.[3] So in an action by one of several partners.[4] An action can not be maintained by an author for a publication disparaging his copyright work, without an allegation of special damages.[5]

§ 1681. **Exemplary Damages.**—If the injury was willful or intentional, if the express malice is proved, the jury are at liberty to award damages, not only to compensate the actual and pecuniary loss upon the ground of compensation for mental suffering, public disgrace, etc., but they may further award exemplary damages.[6]

§ 1682. **Names of Customers Lost.**—As a general rule, the names of persons who have refused to deal with the plaintiff must be stated.[7] But if it is in the nature of things impracticable for him to know them, he may prove general loss of business.[8] It is properly a question of evidence which can not be settled before the trial.

§ 1683. **Corporations.**—A corporation aggregate has the capacity to compose and publish a libel, and by reason thereof, when done, becomes liable to an action for damages, by the person of and concerning whom the words are composed and published.[9]

§ 1684. **For Libel—The Words not Being Libelous in Themselves.**

Form No. 423.

[T LE.]

The plaintiff complains, and alleges:

[1] Ryckman v. Delavan, 25 Wend. 186; reversing White v. Delavan, 17 Id. 50.

[2] Squier v. Gould, 14 Wend. 159; Birch v. Benton, 26 Mo. 155; Johnson v. Robertson, 8 Port. 486; Barnes v. Trundy, 31 Me. 321; Bostwick v. Nickelson, Kirby, 65; Bostwick v. Hawley, Id. 290; Shipman v. Burrows, 1 Hall, 399; Harcourt v. Harrison, Id. 474; Wilson v. Runyon, Wright, 651.

[3] Perkins v. Mitchell, 31 Barb. 461.

[4] Robinson v. Marchant, 7 Q. B. 918.

[5] Swan v. Tappan, 5 Cush. 104.

[6] Fry v. Bennett, 1 Abb. Pr. 289; Hunt v. Bennett, 19 N. Y. 173; but see 2 Greenl. Ev., sec. 253; and Dain v. Wykoff, 7 N. Y. 191.

[7] Linden v. Graham, 1 Duer, 670.

[8] Evans v. Harries, 1 Hurlst. & N. 251.

[9] Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48.

I. That the plaintiff is, and was, on and before the ..... day of ....., 18...., a merchant, doing business in the city of .....

II. That on the ..... day of ....., 18...., at....., the defendant published a newspaper called the ..... [or in a letter addressed to E. F., or otherwise show how published], the following words concerning the plaintiff: ["A. B., of this city, has modestly retired to foreign lands. It is said that creditors to the amount of ..... dollars are anxiously seeking his address."]

III. That the defendant meant thereby that [the plaintiff had absconded to avoid his creditors, and with intent to defraud them].

IV. That the publication was false.

[DEMAND OF JUDGMENT.][1]

§ 1685. **Ambiguous Article.**—It may be averred of an ambiguous article that it was published with a particular intent, and was so understood by its readers, and this averment may be proved on the trial.[2] This is more strictly correct than to employ an innuendo for the same purpose.[3]

§ 1686. **Capacity must be Averred.**—When the words charged bear relation to the plaintiff in his business or official capacity, such capacity should be averred in a traversible form in the complaint;[4] and the fact of his being engaged in such business or profession at the time the words were spoken should be alleged.[5] In such an action special damages need not be alleged.[6]

§ 1687. **Construction.**—Where the words alleged in a complaint for libel are fairly susceptible of a construction which would render them libelous, the complaint will be sustained upon demurrer, although the words may also be interpreted so as to be innocent.[7] Where, in an action for libel, the words complained of are not *per se* libelous, what the defendant intended and understood them to mean, by those to whom they were published, constitutes a proper subject of averment in pleading and proof on the trial, and if what was so intended and understood by the defendant, and understood by those to

[1] This form is from the New York Code Commissioners' Book of Forms.
[2] Gibson v. Williams, 4 Wend. 320.
[3] Blaisdell v. Raymond, 4 Abb. Pr. 446.
[4] 2 Greenl. Ev., sec. 412; Carroll v. White, 33 Barb. 615.
[5] Carroll v. White, 33 Barb. 615.
[6] Butler v. Howes, 7 Cal. 87. As to the responsibility of an editor in respect to comments upon the manager of a theater, see Fry v. Bennett, 3 Bosw. 200; Id., 5 Sandf. 54; Id., 4 Duer, 247.
[7] Wesley v. Bennett, 5 Abb. Pr. 498.

whom the words were pulished, was libelous, the words are actionable.[1]

§ 1688. **Extrinsic Facts.**—Where the actionable quality of language depends upon the capacity of the plaintiff, and the language itself does not disclose that he is in such capacity or occupation, an averment that plaintiff is of such a trade or profession will be sufficient. But where the language is actionable of the plaintiff as an individual also, it is not necessary to allege an inducement.[2] When the words used by the defendant do not of themselves convey the meaning which the plaintiff would attribute to them, and such meaning results only from some extrinsic matter or fact, such extrinsic matter or fact must be alleged in the complaint, and proved on the trial. It is therefore necessary for the plaintiff in such a case distinctly to aver the extrinsic fact upon which he relies to make the publication libelous.[3] Where the publication is not defamatory on its face, the existence of extrinsic facts rendering it defamatory must be alleged.[4] But where it is not essential, such statement would be mere surplusage.[5] By the statute it is no longer necessary to state an inducement. So in New York, and in Missouri.[6] So also in Massachusetts, where, "a distinct averment in regard to the person spoken of, and a clear reference of the calumnious words to that person, is all that is required."[7]

§ 1689. **Innuendo.**—The office of an innuendo is to explain, not to extend, what has gone before, and it can not enlarge the meaning of words unless it be connected with some matter of fact expressly averred.[8] Nor can it change the ordinary meaning of language.[9] Nor introduce new matter.[10] It is only a link to attach together facts already known to the court.[11] It can not attribute to words a meaning which renders them actionable,[12] without a prefatory averment of extrinsic facts which makes them

[1] Maynard v. Fireman's Fund Insurance Co., 34 Cal. 48.

[2] Townshend on Slander and Libel, 400; Gage v. Robinson, 12 Ohio, 250.

[3] Caldwell v. Raymond, 2 Abb. Pr. 193; see also, Cass v. Anderson, 33 Vt. 182; Casten v. Andrews, 16 Pick. 1.

[4] Pike v. Van Wormer, 5 How. Pr. 171; S. C., 6 Id. 99; Fry v. Bennett, 5 Sandf. 54; Dias v. Short, 16 How. Pr. 322; Blaisdell v. Raymond, 4 Abb. Pr. 446; Carroll v. White, 33 Barb. 615; Culver v. Van Anden, 4 Abb. Pr. 375.

[5] Townshend on Slander and Libel, 397.

[6] Srieber v. Wensel, 19 Mo. 513; and Wisconsin, Van Slyke v. Carpenter, 7 Wis. 173.

[7] Miller v. Parish, 8 Pick. 383; Stark. on Slan. 390.

[8] Patterson v. Edwards. 2 Gilm. 720; Van Vechten v. Hopkins, 5 Johns. 211.

[9] Hays v. Mitchell, 7 Blackf. 117.

[10] Nichols v. Packard, 16 Vt. 83; Weir v. Hoss, 6 Ala. 881.

[11] Cooke on Defamation, 94.

[12] Holton v. Muzzy, 30 Vt. 365.

slanderous.[1] The use of innuendoes is in part retained and in part dispensed with under our system of pleading. If the words used are not libelous *per se*, but are made so by some extrinsic matter alleged by way of inducement, innuendoes are necessary to show the connection of such words with the intrinsic facts. So, also, where the publication is made libelous by reference to extrinsic matter not necessary to be alleged. In such case, the extrinsic fact should be suggested by an innuendo. Where words are not libelous *per se*, the extraneous facts must be stated in the introduction or inducement; as an innuendo can not extend, but only apply the words.[2] The employment of the innuendo will be indulged where the convenience of pleading demands it, though in some cases it may not be strictly proper.[3]

§ 1690. **Innuendoes, when not Essential.**—When the language is not in itself applicable to the plaintiff, no innuendo can make it so.[4] But if the plaintiff is designated by another name in the libel, his real name may be designated by an innuendo.[5] Where it is desired to connect the words charged with the colloquium, or to show the meaning imputed to words libelous *per se*, we consider that innuendoes may be dispensed with; and it will always be unsafe to rely on an innuendo, unsupported by a distinct prefatory averment, to show a libelous meaning not evident from the words used.[6]

§ 1691. **Letter.**—A complaint which alleges that defendant sent a letter to plaintiff, and that the same was, by means of such sending thereof, received and read by plaintiff, and thereby published by the plaintiff, is not good; for the letter is presumed to be sealed, and sending a letter is not publication.[7] But reading aloud a letter containing libelous matter amounts to publication.[8]

§ 1692. **Libelous Imputations.**—Among imputations which are libelous are an imputation of the receipt of money for procuring a public appointment; an imputation of insanity;[9] corruption against a member of the legislature;[10] a statement

[1] Watts v. Greenlee, 2 Dev. 115; Brown v. Brown, 14 Me. 317; Beswick v. Chappel, 8 B. Mon. 486; Dottarer v. Bushy, 16 Penn. St. 207; 2 Bibb, 319.

[2] Nichols v. Packard, 16 Vt. 83; Brown v. Brown, 14 Me. 317; Harris v. Burley, 8 N. H. 256; Linville v. Earlywine, 4 Blackf. 469; Tappan v. Wilson, 7 Ohio, 190, part 1.

[3] See Blaisdell v. Raymond, 4 Abb. Pr. 446; Caldwell v. Raymond, 2 Id. 193.

[4] Townshend's Slan. & Lib. 114, 426.

[5] Hays v. Brierly, 4 Watts, 392.

[6] As to proof of libelous meaning by extraneous evidence, and as to sufficiency of innuendo drawn, see Wachter v. Quenzer, 29 N. Y. 547; Butler v. Wood, 10 How. Pr. 222.

[7] Lyle v. Clason, 1 Cai. 581.

[8] Snyder v. Andrews, 6 Barb. 43.

[9] Perkins v. Mitchell, 31 Barb. 461.

[10] Littlejohn v. Greeley, 13 Abb. Pr. 41.

of the keeper of an intelligence office reflecting on the business capacity of the partners of a mercantile firm.[1]

§ 1693. **Libelous Intent and Meaning.**—Where a complaint only averred a libelous intent and meaning on the part of the defendant in the composing and publishing of the words, without averring that they were so understood by those to whom they were published, a demurrer on the complaint on the ground that the written and published words set forth do not constitute a libel, should be sustained.[2]

§ 1694. **Special Damage.**—When the words are in their natural and obvious construction injurious, some damage is to be be presumed, and it is not essential to allege special damage;[3] but when the court can discern no injurious meaning in the plain and natural purport of the publication itself, the plaintiff must aver and prove special damage.[4]

§ 1695. **Of and concerning Plaintiff.**—Although inducement may be necessary to explain the matter alleged to be libelous, it is enough to state in the declaration that the publication was "of and concerning" the plaintiff.[5] The court assumes the words complained of do in fact refer to the plaintiff.[6] By section 460, California code civil procedure, the averment that the same was published concerning the plaintiff supplies the place of all averments of extrinsic facts which might otherwise be necessary to show the application of the words charged to the plaintiff. This averment is essential, and can not be supplied by an innuendo.

§ 1695. **Reputation—Character.**—Reputation is the estimate in which an individual is held by public fame in the place where he is known;[7] and it is not necessary to prefix the word "general."[8] The word "character" and "reputation," though often used synonymously, are in fact not synonymous.[9] "Character" is a term convertible with comm n report.[10] "General character" is the estimation in which a person is held in the community where he resides.[11] It is the result of general con-

[1] Taylor v. Church, 4 Seld. 451; see, further, Townshend on Slan. and Lib.

[2] Maynard v. F. F. Ins. Co., 34 Cal. 48.

[3] Perkins v Mitchell, 31 Barb. 461; Hicks v. Walker, 2 G. Greene (Iowa), 440.

[4] Caldwell v. Raymond, 2 Abb. Pr. 193; Stone v. Cooper, 2 Den. 299; Bennett v. Williamson, 4 Sandf 60.

[5] Townshend on Sland. and Lib. 406.

[6] Wesley v. Bennett, 5 Abb. Pr. 498.

[7] Cooper v. Greeley, 1 Den. 347.

[8] French v. Millard, 2 Ohio St. 50.

[9] Bucklin v. The State, 20 Ohio, 18; French v. Millard, 2 Ohio St. 50. That they are the same, see Kimmel v. Kimmel, 3 Serg. & R. 337.

[10] Id.

[11] See Douglass v. Tousey, 2 Wend. 354.

duct[1] "Chaste character" means actual personal virtue, not actual reputation.[2]

§ 1697. **Words with a Covert Meaning.**—Words which on their face appear to be entirely harmless may under certain circumstances convey a covert meaning wholly different from the ordinary and natural interpretation usually put upon them. To render such words actionable, it is necessary for the pleader to aver that the author of the libel intended them to be understood, and that they were in fact understood by those who read them in their covert sense.[3] And when a hidden defamatory meaning is sought to be attributed to words in themselves innocent, and on their face containing no such sense, by extrinsic facts outside and independent of the publication itself, the knowledge of such facts must be shown by averment to have existed in the breast of the defendant at the time of the publication.[4]

§ 1698. **The Same—By an Attorney at Law.**

Form No. 424.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff was, on and before the ..... day of ....., 18..., an attorney at law of the several courts of record of the state of ....., duly admitted as such to practice therein, as such attorney, and had practiced, and still continued to practice as such attorney at law, in the several courts of record in said state of ....., and had always, as such attorney at law, conducted and demeaned himself with honesty and fidelity, and had never been guilty, or suspected to have been guilty, of any misconduct or malpractice, in his said capacity and profession of an attorney at law.

II. That on the ..... day of ....., 18...., at ....., the defendant published in a newspaper called the ....., the following words concerning the said plaintiff, and of and concerning him in his said capacity and profession of an attorney at law [set forth the words used].

III. That defendant meant thereby that [state innuendo].

IV. That said publication was false and defamatory and by means thereof the plaintiff had been and is greatly injured and

[1] Sharp v. Scogin, Holt's N. P. C. 541; 3 Am. Law J., N. S., 145.

[2] Carpenter v. The People, 8 Barb. 603; Crozier v. The People, 1 Park. Cr. 453; Safford v. The People, Id. 474.

[3] Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48; see also Rundell v. Butler, 7 Barb. 260; Wesley v. Bennett, 5 Abb. Pr. 498; and Carroll v. White, 33 Barb. 618.

[4] Smith v. Ashley, 11 Met. 367; Dexter v. Spear, 4 Mason, 115.

prejudice in his reputation aforesaid, and has also lost and been deprived of great gains and profits, which would otherwise have arisen and accrued to him in his said profession and business, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1699. The Same—By a Physician.

Form No. 425.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned the plaintiff was a physician, practicing as such at.....

II. That on the ..... day of ....., 18...., the defendant published in a newspaper called the ....., the following words concerning the plaintiff [set forth the words used].

III. That said publication was false and defamatory, and by means thereof the plaintiff was injured in his reputation, and in his said good name and credit as a physician, and in his practice as such, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1700. For Libel—Charge of Dishonesty, etc., in Business.

Form No. 426.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the plaintiff was a corporation existing by or under the laws of this state, was engaged in business in the city of ....., as a banker and stock broker.

II. That the business of this plaintiff as a ..... has always depended largely on the good reputation and credit of this plaintiff, and on the trust reposed in it, and by their shareholders and the public, in consequence thereof.

III. That the defendant was, at the times hereinafter mentioned, the publisher and proprietor of the ....., a newspaper published in the city of .....

IV. That the defendant, well knowing the premises, did, on the ..... day of ....., 18..., compose and publish in said newspaper, concerning the plaintiff, and concerning the premises, the false and defamatory matter following, to wit [here insert the words of libel, innuendoes, etc.]

V. That by reason of the premises, the plaintiff has been injured in its reputation and credit, to its damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1701. **Corporations—Special Damage.**—Incorporated companies established for the purpose of transacting business, *e. g.*, banks, may maintain actions for libel, the same as individuals, for words affecting their business or property, and without alleging special damages.[1]

§ 1702. **For Charge of Crime—Words not Libelous on their Face.**

Form No. 427.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the [dwelling-house of the defendant had been burned down, and was suspected that it had been feloniously set on fire.

II. That on the ..... day of ....., 18..., at ....., the defendant published in a newspaper called ....., the following words concerning the plaintiff: "One A. B. kindled the fire, and I can prove it."

III. That the defendant meant thereby that the plaintiff had feloniously set fire to said house.

IV. That the said publication was false and defamatory.

V. That plaintiff hath sustained damage by reason of said false and defamatory publication in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1703. **For Accusing Plaintiff of Perjury in his Answer to a Complaint.**

Form No. 428.

[TITLE.]

The plaintiff complains, and alleges:

I. That before the committing of the grievances hereinafter mentioned, the plaintiff had filed his answer in a certain action then pending against him in the superior court of the county of ....., state of ....., wherein the defendant herein was plaintiff; and which said answer was verified by this plaintiff.

II. That on the ..... day of ....., 18..., at ....., the defendant, well knowing the premises, published and caused and procured to be published, in a newspaper called the ....., concerning the plaintiff and his said answer, the following words [here state the libelous matter]; and in a certain other part of the said libel, the following words [here state libelous matter].

III. That said publication was and is false and defamatory, and by reason thereof the plaintiff hath sustained damage in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

[1] Shoe and Leather Bank v. Thompson, 23 How. Pr. 253.

§ 1704. **For Composing a Libel not Directly Accusing the Plaintiff of Perjury.**

Form No. 429.

[TITLE.]

The plaintiff complains, and alleges:

I. That before the committing of the grievances by the defendant hereinafter mentioned, a certain action had been pending in the superior court of the county of ....., state of ....., wherein one A. B. was plaintiff and one C. D. was defendant, and which action had been then lately tried in said court, and on such trial the plaintiff herein was examined on oath, and had given his evidence as a witness in behalf of the said A. B.

II. That on the ..... day of ....., 18...., at ....., the defendant published in a newspaper called the ....., the following words concerning the plaintiff and the said action, and concerning the evidence given by the said plaintiff upon the said trial as such witness, that is to say: "He" (meaning the plaintiff) "was forsworn on the trial" (meaning the said trial), and that he, the said plaintiff, in giving his evidence as such witness on said trial, had committed willful and corrupt perjury.

III. That said publication was and is false and defamatory.

IV. That by reason of said false and defamatory publication the plaintiff hath been damaged in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1705. **For a Libel not Directly Accusing the Plaintiff of Larceny.**

Form No. 430.

[TITLE.]

The plaintiff complains, and alleges:

I. That before the committing of the grievances hereinafter mentioned, a certain horse of the defendant had been feloniously stolen by some person or persons [or state that the defendant "was possessed of a horse, and had asserted that his horse had been feloniously stolen," or "it had been asserted that his said horse had been feloniously stolen"].

II. That on the ..... day of....., 18..., at ....., the defendant, well knowing the premises, published in a newspaper, called the ....., the following words concerning the plaintiff: "He is the person who took my horse from the field."

III. That the defendant meant thereby that the plaintiff had feloniously stolen his said horse.

IV. That the said publication was false and defamatory, and

by reason of said false and defamatory publication the plaintiff hath sustained damage in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1706. **For Libel by Signs.**

Form No. 431.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant, contriving to injure the plaintiff in his reputation, and to bring him into public contempt, disgrace and ridicule, did, in the public street of said ....., wrongfully and maliciously make, and cause to be made, an effigy or figure intended to represent the person of the plaintiff, and hung up and caused to be hung up the said effigy, in the view of the neighbors of the plaintiff and of the public then and there assembled, by means of which the plaintiff has been greatly injured in his reputation, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1707. **For Slander—The Words being Actionable in Themselves.**

Form No. 432.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of....., 18..., at ....., the defendant spoke, in the hearing of A. B. [or sundry persons], of and concerning the plaintiff, the false and scandalous words following [he is a thief], to the damage of the plaintiff ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1708. **Abatement of Action.**—By the common law, actions of tort die with the person, and this rule applies to actions for slander and libel, except in those states where a different rule is prescribed by the statute.[2]

§ 1709. **Ambiguous Words.**—Where words are ambiguous and uncertain in their meaning, the complaint must allege such circumstances as will show that they were uttered with a slanderous meaning.[3]

§ 1710. **Averments in Complaint.**—The New York code has changed the common-law rule of pleading in actions of slander in one particular: that is, although it may be uncertain

[1] A caricature may be libelous: See Viele v. Gray, 19 How. Pr. 550; 10 Abb. Pr. 1.

[2] Townshend on Slander and Libel, 389; see 1 W. Saund. 316; Nettleton v. Dinehart, 5 Cush. 543, 544; Walford on Parties, 1392, 1449.

[3] Pike v. Van Wormer, 5 How. Pr. 171; S. C., 6 Id. 99.

to whom the words were intended to apply, it is no longer necessary to insert in the complaint any averment showing they were intended to apply to the plaintiff.[1] A complaint which avers that defendant spoke certain words of and concerning the plaintiff, and setting forth the words which appear actionable *per se*, sufficiently states a cause of action.[2]

§ 1711. **Chastity.**—Ordinarily, and in the absence of any statutory provision, words published orally charging a woman with want of chastity are not objectionable *per se*.[3] Want of chastity, special damage being averred, as to unmarried female, is actionable;[4] also as against a man,[5] or a married woman.[6] In California the common-law rule that charging a want of chastity is not actionable *per se*, has been changed by the code, whether the words are spoken of a man or woman.[7]

§ 1712. **Construction.**—In a declaration in slander, the words laid as the slanderous charge will be understood by the court in their natural and popular sense.[8]

§ 1713. **Continuando.**—In complaint for slander the words spoken should not be alleged with a continuando. Slanderous words spoken at one time constitute one cause of action. The same or other slanderous words spoken at other times constitute other causes of action, but if relied on they should be separately pleaded, in separate paragraphs.[9]

§ 1714. **Counts in Complaint.**—It is allowable to include in the same declaration divers distinct words of slander of different import.[10] But a new count for another slander can not be added after the right of action has been barred by the statute of of limitations.[11] Under the old rule the plaintiff was held to strict proof of the words as charged in the declaration; and to meet this rule it was necessary to state the words in a variety of counts adapted to the evidence relied on.[12]

§ 1715. **Damages.**—In an action for slander, where words are charged to have been spoken of and concerning a plaintiff as a clerk or tradesman, which it is alleged was his profession, it is unnecessary to allege special damages.[13]

[1] Pike v. Van Wormer, 6 How. Pr. 99.
[2] Malone v. Stilwell, 15 Abb. Pr. 421.
[3] Townshend on Slander and Libel, 175 et seq.
[4] Fuller v. Fenner, 16 Barb. 333.
[5] Terwilliger v. Wands, 17 N. Y. 54.
[6] Wilson v. Goit, 17 N. Y. 442; Olmstead v. Brown, 12 Barb. 657; Klein v. Hentz, 2 Duer, 633.
[7] Cal. Civ. Code, sec. 46.
[8] Tuttle v. Bishop, 30 Conn. 89.
[9] Swinney v. Nave, 22 Ind. 178.
[10] Hall v. Nees, 27 Ill. 411.
[11] Smith v. Smith, 45 Penn. St. 403.
[12] See Olmstead v. Miller, 1 Wend. 506; Aldrich v. Brown, 11 Id. 596; Keenholtz v. Becker, 3 Den. 346; Fox v. Vanderbeck, 5 Cow. 513; Howard v. Sexton, 4 N. Y. 157; Rundell v. Butler, 7 Barb. 260.
[13] Butler v. Howes, 7 Cal. 87.

§ 1716. **Disease.**—With respect to the charge of having a disease, it is actionable to charge having certain diseases, but it has been held not actionable to charge one with having had such diseases.[1] Thus, that a married woman has (in the present tense) a venereal disease;[2] that a man has a venereal disease.[3]

§ 1717. **Entire Conversation.**—A count of a petition in an action for slander, which sets out the entire conversation in which the slander was spoken, contains only one cause of action, although the conversation consists of several parts, each of which is actionable.[4] A complaint in an action for slander which states that the words contained therein are those which the defendant spoke concerning the plaintiff is good, although the style of such words is unusual for a conversation.[5]

§ 1718. **Essential Averments.**—In an action for slander it should be alleged that the defendant spoke the words in the presence and hearing of divers persons. To allege a speaking merely is not sufficient.[6] But in Indiana, by statute, it is sufficient merely to allege the speaking.[7] Or it is sufficient to allege, "in the hearing of certain persons," naming them;[8] or of certain persons named, and divers others, not naming the others.[9]

§ 1719. **Husband and Wife.**—By the statute of New York of 1860 and 1862, a married woman may sue alone and without her husband for slander or libel; and so in Pennsylvania.[10] But a wife can not sue her husband for slander;[11] but if there be no statutory provision to govern such actions, the action should be brought in the name of both husband and wife.[12] And if the husband dies, the action survives to the wife; but if the wife dies before verdict, the action abates.[13] If the words concerning a married woman are actionable because of special damage to the husband, the husband must sue alone,[14] even if the husband and wife live apart under a deed of separation.[15] So for a

[1] Townshend on Sland. and Lib. 184.
[2] Williams v. Holdredge, 22 Barb. 396.
[3] Hewitt v. Mason, 24 How. Pr. 366.
[4] Cracraft v. Cochran, 16 Iowa, 301.
[5] Hull v. Vreeland, 42 Barb. 543.
[6] Style, 70; Stark. Slan. 360.
[7] Guard v. Risk, 11 Ind. 156.
[8] Burbank v. Horn, 39 Me. 233.
[9] Bradshaw v. Perdue, 12 Ga. 510; Ware v. Cartledge, 24 Ala. 622.
[10] Rangler v. Hummell, 37 Penn. St. 100; see also N. Y. Code, sec. 450.
[11] Freethy v. Freethy, 42 Barb. 641; Tibbs v. Brown, 2 Grant's Cas. (Penn.) 39.
[12] Stark. on Sland. 349; Newton v. Rowe, 8 Sc. L. R 26; Dengate v. Gardiner, 4 Mee. & W. 5; Sayre, 33; Baldwin v. Flower, 3 Mod. 120; Long v. Long, 4 Barr, 29.
[13] 12 Serg. & R. 76; see Style, 138.
[14] Saville v. Sweeney, 4 Barn & Adol. 514; Long v. Long, 4 Barr, 29; Stark. on. Slan. 351; Fort. 377; 1 Lev. 140; Klein v. Hentz 2 Duer, 633.
[15] Beach v. Ranney, 2 Hill, 309; see Townshend on Slan. and Lib. 390.

charge of joint larceny, the husband should sue alone.[1] Where the language published concerns both husband and wife, the husband may sue alone for the injury to him, and the husband and wife may sue jointly for the injury to the wife.[2] For a publication by a married woman, the action must be against her and her husband.[3]

§ 1720. **Joinder of Actions.**—A cause of action against the husband for the wrongful act of his wife can not be joined with a cause of action against him for his own wrongful act. Thus, where the complaint in an action against husband wife stated a cause of action for slanderous words of the wife, and a further cause of action for slanderous words of the husband, it was held that the two causes of action were improperly joined.[4]

§ 1721. **Jurisdiction.**—The court has jurisdiction in an action of slander, although the slanderous words were spoken in another state.[5]

§ 1722. **Language in Part Slanderous.**—Where the complaint sets out language used on a single occasion, a part of which is slanderous and the rest is not, the latter portion will not be stricken out as irrelevant. Though it may not be necessary to allege in the complaint all that was said at the time, it is proper to do so.[6] Plaintiff was not bound, however, to prove all the words charged. If he proved some of them, and those proved were actionable, it was enough.[7] And different sets of words importing the same charge, and laid as spoken at the same time, might under the former practice be included in the same count.[8] If any of the words are actionable judgment must be for the plaintiff.[9]

§ 1723. **Of or concerning Plaintiff.**—It is sufficient to aver substantially that the words were spoken of plaintiff. An express averment of the fact is not necessary.[10]

§ 1724. **Place and Time.**—The place[11] or time of speaking

[1] 20 Penn. 159.
[2] Id.
[3] 5 Car. & P. 484; 2 Wils. 227; Style, 349; 2 W. Saund. 117.
[4] Malone v. Stilwell, 15 Abb. Pr. 421.
[5] Hull v. Vreeland, 42 Barb. 543.
[6] Deyo v. Brundage, 13 How. Pr. 221; Root v. Lowndes, 6 Hill, 518.
[7] Loomis v. Swick, 3 Wend. 205; Purple v. Horton, 13 Id. 9; compare, also, Dievt v. Tanner, 20 Id. 190; Genet v. Mitchell, 7 Johns. 120.
[8] Rathbun v. Emigh, 6 Wend. 407; Milligan v. Thorn, Id. 412.
[9] Edds v. Waters, 4 Cranch C. Ct. 170.
[10] Brown v. Lamberton, 2 Binn. 34; Brashen v. Shepherd, Ky. Dec. 249; Nestle v. Van Slyck, 2 Hill, 282; but see Titus v. Follet, Id. 318; Tyler v. Tillotson, Id. 508; Cave v. Shelor, 2 Munf. 193; Harper v. Delp, 3 Ind. 225; Rex v. Marsden, 4 Man. & Sel. 164; Baldwin v. Hildreth, 14 Gray (Mass.), 221.
[11] Jefferies v. Duncombe, 11 East, 226.

the words[1] are not material; but it must be prior to the commencement of the action.[2]

§ 1725. **Presence and Hearing, Allegation of.**—The words used must be alleged as having been spoken of and concerning the plaintiff, in the presence and hearing of some person or persons.[3] But the plaintiff may amend on the trial, if defendant is not misled.[4] It is a sufficient allegation in a complaint in an action for slander, to show that the words were spoken in the presence and hearing of some person or persons; to state that in certain conversations or discussions defendant did publish, declare, etc., as these words sufficiently imply the presence of hearers, and indicate that the declarations were public and notorious.[5]

§ 1726. **Presumption of Malice.**—Where the occasion upon which the words for which an action of slander is brought were spoken repels any presumption of malice, and proof of it is necessary to maintain the action, it is sufficient to aver that they were spoken maliciously, without setting forth in the complaint the facts and circumstances which show the existence of malice.[6]

§ 1727. **Published.**—"Published" *ex vi termini*, imports a speaking in the presence of a third party.[7] And this averment is sufficient, without averring specially in the presence of others.[8] That the words were spoken would be sufficient, if accompanied by an averment implying publication to a third person.[9]

§ 1728. **Several Liability.**—As a general rule, an action of slander will not lie against two persons, as every speaker must be sued separately,[10] although it seems that where the words are alleged to have been uttered in pursuance of a conspiracy between two or more defendants, the action may be maintained.[11]

§ 1729. **Slander Defined.**—Slander is the imputation: 1. Of some temporal offense, for which the party may be indicted and punished in the temporal courts; 2. Of an existing contagious disorder, tending to exclude the party from society; 3. Of an unfitness to perform an office or employment of profit,

[1] 22 Barb. 87.
[2] Taylor v. Surgingger, 2 Rep. Con. Ct. 367.
[3] Anonymous, 8 How. Pr. 406; Wood v. Gilchrist, 1 Code R. 117.
[4] Id.
[5] Hurd v. Moore, 2 Or. 85.
[6] Viele v. Gray, 10 Abb. Pr. 1.
[7] Duel v. Agan, 1 Code R. 134.
[8] Burton v. Burton, 3 Iowa, 316.
[9] Taylor v. How, Cro. Eliz. 861.
[10] Malone v. Stilwell, 15 Abb. Pr. 421.
[11] Ch. Pl. 74; Bull. N. P. 5; Forsyth v. Edmiston, 2 Abb. Pr. 430.

or want of integrity in an office of honor; 4. Words prejudicing a person in his lucrative profession or trade; 5. Any untrue words occasioning actual damage;[1] slander being an unwritten or unprinted libel.[2] It is also defined to be "the publishing of words in writing or by speaking, by reason of which the person to whom they relate becomes liable to suffer some corporal punishment or to sustain some damage."[3] Slander is a private wrong or tort, cognizable by the common law, the remedy for which is a civil action, formerly known as an "action on the case for words," and now as "an action, or the action of or for slander."[4]

§ 1730. **Special Damages.**—The loss which ensues as a necessary consequence is termed damage; the loss which ensues as a natural and proximate consequence is termed special damages.[5] Special damages consist in the loss of marriage, loss of consortium of husband and wife, loss of emoluments, profits, customers, employment, or gratuitous hospitality, or by being subjected to any other inconvenience or annoyance occasioning or involving a pecuniary loss.[6] Mere apprehension of loss is not such special damage as will maintain an action.[7] Mental distress, physical illness, and inability to labor, occasioned by the aspersion of words not in themselves actionable, are no grounds for special damages.[8]

§ 1731. **Special Damages must be Alleged.**—Special damages, or those damages which are not the necessary consequence of the language complained of, must be specially alleged in the complaint.[9] A pecuniary loss must be shown to entitle the plaintiff to a remedy.[10] The objections that allegations of special damage—*e. g.*, in an action for slander—are not sufficiently specific, can not be raised by demurrer, but only by motion to make more specific.[11]

§ 1732. **Subsequent Usage.**—In slander, allegations of a subsequent usage of the words complained of are inadmissible. A repetition may be proved without such allegation.[12] If

[1] 1 Hilliard on Torts, c. 7, p. 33.
[2] Id. 32.
[3] Bac. Abr.
[4] Townshend on Slander and Libel, 22.
[5] Id. 148.
[6] Id. 227.
[7] Id. 230; Terwilliger v. Wands, 17 N. Y. 54; Wilson v. Goit, Id. 442.
[8] The case of Bradt v. Towsley, 13 Wend. 253; and Fuller v. Fenner, 16 Barb. 333; overruled, Terwilliger v. Wands, 17 N. Y. 54; Wilson v. Goit, Id. 442.
[9] Townshend on Slander and Libel, 428, citing various authorities.
[10] Beach v. Ranney, 2 Hill, 309; Herrick v. Lapham, 10 Johns. 281; Hallock v. Miller, 2 Barb. 630; Hersh v. Ringwalt, 3 Yeates, 508.
[11] Hewitt v. Mason, 24 How. Pr. 366.
[12] Gray v. Nellis, 6 How. Pr. 290.

after a recovery has been had in an action for slander or libel, special damage occurs, no action can be maintained therefor. The first recovery is a bar to any subsequent action.[1] Ordinarily, the repetition of language by another than the first publisher is not a natural consequence of the first publication, and therefore, except in certain cases, the loss resulting from such repetition does not constitute special damage.[2]

§ 1733. **Specific Words.**—The specific words in which slander is conveyed must be set forth in the petition in an action of slander; and it is not sufficient to state the effect of the words merely, or to allege that the defendant charged the plaintiff with a particular crime.[3]

§ 1734. **For Slander—Words Spoken in a Foreign Language.**

Form No. 433.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at....., the defendant, in the presence and hearing of divers persons who understood the [German] language, spoke concerning the plaintiff the following words in the said [German] language [here set forth the words in the German or foreign language]; and which said words signified, and were understood to mean, in the English language [here set forth a correct translation of the words in English]; and the said [German] words were so understood by the said persons in whose presence and hearing they were spoken.

II. That the defendant meant thereby [set forth innuendo].

III. That the said publication was false and defamatory.

IV. That in consequence [state special damage].

V. That by reason of the speaking and publication of the said false and defamatory words the plaintiff hath been injured in his reputation, to his damage ..... dollars. [If special injury as to business is alleged, add, after the word "reputation," the words "and business."]

[DEMAND OF JUDGMENT.]

§ 1735. **Foreign Language.**—Where the slanderous words were spoken in a foreign tongue, they should be set out in the complaint in the original language, accompanied by an averment of their meaning in English, and it should also be alleged that

[1] Townshend on Slander and Libel, 231; Cooke Defam. 24; Fittler v. Veal, Cas. K. B. 542.

[2] Townshend on Slander and Libel, 2:8

[3] Taylor v. Moran, 4 Met. (Ky.) 127.

the persons present understood the language used.[1] The complaint is, however, amendable in this respect upon terms.[2] In the case of foreign words, it must be alleged that the persons present understood them.[3] But in Ohio it is held where words are spoken in German, in a German country, it will be presumed that they were understood.[4]

§ 1736. **For Slander—The Words not being Actionable in Themselves.**

Form No. 434.

[Title.]

The plaintiff complains, and alleges:

I. That on the ..... day of ...., 18..., at ...., the defendant said to one C. D., concerning the plaintiff ["He is a young man of remarkably easy conscience."]

II. That the plaintiff was then seeking employment as a private secretary of said C. D., and that the defendant meant by said words that the plaintiff was not trustworthy as a private secretary.

III. That the said words were false.

IV. That in consequence of the said words [the said C. D. refused to employ the plaintiff as private secretary], to his damage ..... dollars.

[Demand of Judgment.]

§ 1737. **Innuendo.**—Where the words themselves are ambiguous, and do not necessarily impute a crime, the innuendo can not enlarge the meaning of the words spoken beyond the averment of the intention by which the speaking of the words is introduced.[5] It may be averred that the defendant, by means of the words, insinuated and meant to be understood by the hearers as charging the plaintiff with the crime imputed.[6] But if the words are unambiguous, such averment is unnecessary.[7] And where the innuendo extends the meaning, the excess in meaning may be disregarded.[8]

[1] Keenholts v. Becker, 3 Den. 346; Wormouth v. Cramer, 3 Wend. 394; Lettman v. Ritz, 3 Sandf. 734; Amann v. Damm, 8 C. B. (N. S.) 597.

[2] Lettman v. Ritz, 3 Sandf. 734.

[3] Wormouth v. Cramer, 3 Wend. 394; Stark. Slan. 360; Zeig v. Ort, 3 Chand. Wisc. 26; Amann v. Damm, 8 Com. B. (N. S.) 597.

[4] Bechtel v. Shatler, Wright, 107.

[5] Weed v. Bibbins, 35 Barb. 315; and see Fry v. Bennett, 5 Sandf. 54. As to the office of the innuendo as employed prior to the code, consult Mott v. Comstock, 7 Cow. 654; Id. 658; Tyler v. Tillotson, 2 Hill, 507; Butler v. Wood, 10 How. Pr. 222; Tillotson v. Cheatham, 3 Johns. 56; Van Vechten v. Hopkins, 5 Id. 211; Lindsey v. Smith, 7 Id. 359; Vaughan v. Havens, 8 Id. 109; Fry v. Bennett, 5 Sandf. 54; Andrews v. Woodmansee, 15 Wend. 232; Cornelius v. Van Slyck, 21 Id. 70; Croswell v. Weed, 25 Id. 621.

[6] Rundell v. Butler, 7 Barb. 260.

[7] Walrath v. Nellis, 17 How. Pr. 72.

[8] Carroll v. White, 33 Barb. 615; Weed v. Bibbins, 32 Id. 315.

§ 1738. **Tenor, Import, and Effect.**—It is bad pleading to aver in the complaint that defendant uttered "certain false and defamatory words and statements, of the following tenor and import, and to the following effect; that is to say," etc., though an allegation of their "substance" might be sufficient.[1]

§ 1739. **What Words are Actionable.**—Although words spoken of a party do not necessarily import anything injurious in themselves, yet they may when taken in connection with other charges made against the party at the same time. The whole being spoken of the party as a merchant, and with intent to affect his credit, have a very different meaning from their ordinary one, and so taken may sustain an action.[2]

§ 1740. **Words of Disgrace.**—Mere words of disgrace, unless written and published, are not actionable.[3]

§ 1741. **Words not per se Slanderous.**—In actions of slander for words not in themselves actionable, the right to recover depends upon the question whether they caused special damage, and the special damage must be fully and accurately stated.[4]

§ 1742. **For Slander Respecting Plaintiff's Trade.**

Form No. 435.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of the commission of the grievances hereinafter mentioned, the plaintiff was engaged in business as merchant [or as the case may be], and had always maintained a good reputation and credit as such [merchant].

II. That on the ..... day of ....., 18..., the defendant, in the presence and hearing of a number of persons, maliciously, and with intent to cause it to be believed that the plaintiff kept false and fraudulent books of account in his said business, published the following words concerning this plaintiff, and concerning his said business: "He keeps false accounts, and I can prove it" [or state the words complained of].

III. That the said words were false.

IV. That in consequence of said words, a number of persons, and in particular [name the persons referred to], who had there-

[1] Forsyth v. Edmiston, 2 Abb. Pr. 430; Maitland v. Goldney, 2 East, 426; Cook v. Cox, 3 Man. & Sel. 110. As to the former rules of pleading and evidence in actions of slander, and their operation, see Bisbey v. Shaw, 2 Kern. 67.

[2] Beardsley v. Tappan, 1 Blatch. 588.

[3] Johnson v. Brown, 4 Cranch C. Ct. 235.

[4] Linden v. Graham, 1 Duer, 672; Hallock v. Miller, 2 Barb. 630; Evans v. Harries, 1 Hurlst. & N. 251; Hartley v. Herring, 8 T. R. 130; Harrison v. Pearce, F. & F. 567.

tofore been accustomed to deal with the plaintiff in his business aforesaid, ceased to deal with him, and the plaintiff was thereby deprived of their custom, and of the profits which he would otherwise have made by a continuance of such dealing, and was otherwise injured in his reputation, to his damage ..... dollars.

[Demand of Judgment.]

§ 1743. **Clerk or Tradesman.**—In an action for slander, where words are charged to have been spoken of and concerning a defendant, as a clerk or tradesman, which, it is alleged, was his profession, it is unnecessary to allege special damage.[1]

§ 1744. **Dishonesty.**—Imputations charging dishonesty against an individual in connection with his business are slanderous *per se*.[2]

§ 1745. **Ignorance and Want of Skill.**—Imputations of gross ignorance and want of skill in his profession, as against a physician, are libelous.[3]

§ 1746. **Insolvency.**—An imputation of insolvency against a petty trader is actionable.[4]

§ 1747. **Mechanical Trade.**—Words imputing to a mechanic want of skill or knowledge in his craft, are actionable, *per se*, if they are clearly shown to have been spoken with reference to the plaintiff's occupation, and the employment is one requiring peculiar knowledge and skill.[5]

§ 1748. **Physician.**—Where words are actionable only because spoken of the plaintiff in his business or profession, averments by way of inducement and colloquium should be inserted. If a physician brings an action for the speaking of words which are disgraceful to him in his profession, he must aver in his complaint that he was a practicing physician at the time the words were uttered, and that they were spoken of and concerning him in his profession; otherwise it is demurrable.

§ 1749. **Special Damages.**—In an action for slander for words spoken of the plaintiff in his trade or business, with a general allegation of loss of business, the jury may assess damages for a general loss or decrease of trade. As a general rule, the customers so lost should be named.[7] The loss of a customer

[1] Butler v. Howes, 7 Cal. 87.
[2] Fowles v. Bowen, 30 N. Y. 20.
[3] Secor v. Harris, 18 Barb. 425; Carroll v. White, 33 Id. 615.
[4] Carpenter v. Dennis, 3 Sandf. 305.
[5] Fitzgerald v. Redfield, 51 Barb. 484; S. C., 36 How. Pr. 97.
[6] Carroll v. White, 33 Barb. 615.
[7] Mayne on Damages, 278, 317; 2 Phill. Ev. 248; Feise v. Linder, 3 Bos. & Pul. 372; Tobias v. Harland, 4 Wend. 537; Hallock v. Miller, 2 Barb. 630.

is special damage, although if the dealing had taken place the plaintiff would have lost by it.[1]

§ 1750. Special Averment—Discharge from Employ.

Form No. 436.

That by reason, etc., one A. B., who had theretofore retained plaintiff in the capacity of ....., for ....., afterwards, on ...., discharged the plaintiff from his employ.

§ 1751. Special Averment—Refusal to Deal.

Form No. 437.

That by reason of the committing of the said grievances by the defendant, E. F., G. H. [etc., who had theretofore dealt with the plaintiff in his trade of a ....., by him then and since carried on], afterwards declined to have any dealings with the plaintiff.

§ 1752. Special Averment—Refusal to Employ.

Form No. 438.

That by reason of said slander, one E. F., who before was about to employ, and would have employed the plaintiff as his servant for certain wages, afterwards, and before the commencement of this suit, refused to employ the plaintiff in his service; and the plaintiff from thence remained out of employment for ..... months.

§ 1753. Special Averment—Refusal to Retain in Employ.

Form No. 439.

That ..... by reason [etc.], one ....., who otherwise would have retained the plaintiff in the capacity of ....., in his business of ....., for wages, afterwards declined so to do; whereby the plaintiff lost [etc.], which would otherwise have accrued to him [etc.]

§ 1754. Special Averment—Refusal to Sell.

Form No. 440.

That by reason [etc.], one A. B., who would otherwise have sold to the plaintiff certain goods, to wit [mention goods], on credit, afterwards refused so to do; whereby, etc.

§ 1755. For Slander—Charging a Criminal Offense.

Form No. 441.

[Title.]

The plaintiff complains, and alleges:

[1] Storey v. Challands, 8 Car. & P. 234. For cases on the subject of averring special damages in actions of slander, see Hallock v. Miller, 2 Barb. 630; Keenholts v. Becker, 3 Denio, 346; Beach v. Ranney, 2 Hill, 309; Herrick v. Lapham, 10 Johns. 281; Olmstead v. Miller, 1 Wend. 506; Sewall v. Catlin, 3 Id. 291; Williams v. Hall, 19 Id. 305; Shipman v. Burrows, 1 Hall, 399; Harcourt v. Harrison, Id. 474. For averment of special damages, see Turner v. Foxhall, 2 Cranch C. Ct. 324.

I. That at the time of the commission of the grievances hereinafter mentioned, the plaintiff sustained a good name and character among his neighbors and acquaintances, for moral worth and integrity, and was never suspected of the crime of forgery.

II. That on the ..... day of ....., 18.., the defendant, in the presence and hearing of a number of persons, spoke the following words concerning the plaintiff: "He is a forger."

III. That the said words were false.

IV. That in consequence of the said speaking of said words the plaintiff has been greatly injured in his good name and reputation, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1756. **Actionable Language.**—When language imputes a charge which, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, it is actionable *per se*.[1] And this rule has been followed in most of the states.[2] In some of the states, it seems that all oral language which imputes an indictable offense, or an offense punishable at law, is actionable *per se*;[3] Or an indictable offense.[4] While in some other states, to be actionable they must impute not only an indictable offense, but such for which corporal punishment may be inflicted as the immediate penalty.[5] Words which impute trespass, assault, battery, and the like are not actionable *per se*, and yet those offenses are punishable by indictment.[6]

§ 1757. **Words Subjecting Plaintiff to Criminal Prosecution.**—Words imputing to plaintiff an act subjecting him to a criminal prosecution, must also impute moral turpitude, or something infamous or disgraceful, detracting from the character of the offender as a man of good morals.[7]

[1] Townshend on Slander and Libel, 132.

[2] See Brooker v. Coffin, 5 Johns. 188; Young v. Miller, 3 Hill, 22; see also Wright v. Paige, 36 Barb. 438; Van Ness v. Hamilton, 19 Johns. 367; 9 Wend. 141; 23 Conn. 585; Andres v. Koppenheafer, 3 Serg. & R. 255; Todd v. Rough, 10 Id. 18; McCuen v. Ludlum, 2 Harrison (N. J.), 12; Johnson v. Shields, 1 Dutcher, 116; Gage v. Shelton, 3 Rich. 242. S. C. L. R.; Kinney v. Hosea, 3 Harr. (Del.) 77; Johnston v. Morrow, 9 Porter (Ala.), 524; Taylor v. Kneeland, 1 Doug. (Mich.) 67; 21 Penn. 522; Billings v. Wing, 7 Vt. 439; 1 Am. Lead. Cas. 113, 3d ed.

[3] Poe v. Grever, 3 Sneed. 666; Dunnell v. Fiske, 11 Metc. 551; Edgerly v. Swain, 32 N. H. 481; Tenney v. Clement, 10 Id. 57.

[4] Kinney v. Hosea, 3 Harr. 77.

[5] Birch v. Benton, 26 Mo. 153; Billings v. Wing, 7 Vt. 439.

[6] Smith v. Smith, 2 Sneed, 478; Dudley v. Horn, 21 Ala. 379; Billings v. Wing, 7 Vt. 439; see note 49.

[7] Quinn v. O'Gara, 2 E. D. Smith, 388; Pike v. Van Wormer, 5 How. Pr. 171; Dias v. Short, 16 Id. 322; Weed v. Bibbins, 32 Barb. 315.

§ 1758. **For Slander—Words Directly Charging a Criminal Offense—Several Causes of Action.**

Form No. 442.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the defendant, in a certain discourse which he had with one A. B., in the presence and hearing of divers persons, spoke the following words concerning the plaintiff [set forth the words].

II. That on the ..... day of ....., 18.., at ....., the defendant, in a certain other discourse which he then had in the presence and hearing of divers other persons, spoke concerning the plaintiff the following other words [set forth the words].

III. That all said words were false and defamatory.

IV. That in consequence of the said speaking of said words, etc.

[DEMAND OF JUDGMENT.]

§ 1759. **Words Charging Offenses.**—Words charging a burning amounting to arson, whether by common law or by statute, are actionable. So of a general charge of forgery. So of a general charge of being a murderer. So of a general charge of being a thief. So of a charge of larceny, or a taking *animo furandi* the personal property of another. Or imputations charging a person with being a receiver of stolen goods.[1] So of a direct charge of perjury.[2] So of an imputation of willful perjury in a suit pending.[3]

§ 1760. **Slander—For Words Directly Charging Perjury.**

Form No. 443.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant, in a certain discourse which he then had concerning the plaintiff, in the presence and hearing of divers persons, spoke and published concerning the plaintiff the words following: "You perjured yourself."

II. That said words were false.

III. That in consequence of the said words the plaintiff is greatly injured in his good name and reputation, and has been

[1] Dias v. Short, 16 How. Pr. 322. As to the imputation of stealing goods, when and where not slanderous *per se*, and to what extent, see Coleman v. Playsted, 36 Barb. 26; Maybee v. Fisk, 42 Id. 326.

[2] See Townshend on Slan. and Lib. 165 et seq., and the cases there cited; Wilbur v. Ostrom, 1 Abb. Pr. (N. S.) 275.

[3] Walrath v. Nellis, 17 How. Pr. 72; Baker v. Williams, 12 Barb. 527.

rendered liable to prosecution for perjury, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1761. **Construction of Words.**—In an action for slander, in charging the plaintiff with perjury, if it appears that the words used to express the charge are such, in the sense in which they would naturally be understood, as to convey to the minds of those to whom they are addressed the impression that the plaintiff had committed perjury, and that the defendant intended to be so understood by those who heard him, such words will of themselves warrant a verdict for the plaintiff, in case the jury find that they were uttered with the intention above stated, and were so understood; and it is not necessary to give additional evidence that the suit was in a court of competent jurisdiction, or that the plaintiff swore falsely, with a corrupt intent.[1]

§ 1762. **Perjury in Another State.**—In a declaration for slander, in charging the plaintiff with perjury in another state, it must be averred that by the laws of such other state, perjury is an offense to which is annexed an infamous punishment.[2]

§ 1763. **Slander—For Words Charging Perjury and Containing Special Inducements.**

Form No. 444.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., a certain action was pending before A. B., a justice of the peace in and for the county of ....., wherein C. D. was plaintiff and E. F. was defendant, and in which suit the plaintiff was duly sworn before the said justice, and gave his evidence as a witness, on the trial of said action, and testified that he "did not know that one M. had run away;" the fact whether the said M. had run away or not being material in said action.

II. That on the ..... day of ...., 18..., at ....., the defendant, in a discourse which he had in the presence and hearing of sundry persons, spoke and published of and concerning the plaintiff, and concerning the said trial and testimony of the plaintiff as a witness in relation to said M., the false and scandalous words following: "He swore to a lie at ....., in the suit between C. D. and E. F.; he said he did not know that M. had run away, and it was a lie for he did

[1] Kern v. Towsley, 51 Barb. 385.

[2] Sparrow v. Maynard, 8 Jones L. (N. C.) 195. As to the charge of false swearing, and the extent of the responsibility of the defendant, see Wilbur v. Ostrum, 1 Abb. Pr. (N. S.) 275.

know it;" meaning that the plaintiff, at the trial of the action aforesaid, had, as a witness, sworn falsely, and committed willful and corrupt perjury.

III. That in consequence of said speaking of said words, etc., [as in preceding form].

[DEMAND OF JUDGMENT.]

CHAPTER IV.

MALICIOUS PROSECUTION.

§ 1764. Common Form.

Form No. 445.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant obtained a warrant for the arrest of this plaintiff from ..... [a police justice of the said city, or as the case may be], on a charge of ....., and the plaintiff was arrested thereon, and imprisoned for ..... days [or hours], and gave bail in the sum of ..... dollars to obtain his release.

II. That in so doing the defendant acted maliciously and and without probable cause.

III. That on the ..... day of ....., 18..., the said justice dismissed the complaint of the defendant, and acquitted the plaintiff [or, the grand jury of the county of ..... ignored the bill against the plaintiff, or otherwise show a termination favorable to him].

IV. That many persons, whose names are unknown to the plaintiff, hearing of the said arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him [or that in consequence of the said arrest, the plaintiff lost his situation as clerk to one A. B.], and has been otherwise injured in his good name and reputation, and whereby and by means whereof he hath sustained damage in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1765. Causes of Action not Assignable.—Causes of action arising out of personal torts which do not survive to the personal representatives of a party, are not assignable.[1] So a cause of action for a malicious prosecution is not assignable.[2]

[1] Zabriskie v. Smith, 3 Kern. 322; 36 Barb. 270; Hoyt v. Thompson, 1 Seld. 347; Boyd v. Blankman, 29 Cal. 19; Conegys v. Vasse, 1 Pet. 193.

[2] Lawrence v. Martin, 22 Cal. 173.

§ 1766. **Conspiracy.**—When two or more persons are sued for a joint wrong done, it may be necessary to prove a previous combination between them in order to secure a joint recovery; but it is not necessary to aver this previous combination in the complaint, and if averred, it is not to be considered as of the gist of the action.[1] An allegation that the defendants have fraudulently confederated and conspired together for the purpose of harassing the plaintiff, by prosecuting separate suits against him for the same cause, and that such suits have been commenced and are prosecuted in pursuance of such conspiracy, is not sufficient to sustain an action or uphold an injunction, when the defendants claim adversely to each other, as well as to the plaintiff, and no direct fraud is charged; the plaintiff, merely averring his belief of such conspiracy, because the defendants have brought separate actions for the same cause, and by the same attorney. Fraud in such a case is not to be presumed; and the conspiracy should be distinctly averred.[2]

§ 1767. **Conspiracy, Averments in Action of.**—In an action for a conspiracy the rule is to allow a great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred, even so far as to allow the individual acts of the conspirators to be averred.[3] So far as the allegations of such acts are scandalous, they should be stricken out, unless they appear to relate to the foundation of the plaintiff's action.[4]

§ 1768. **Conviction.**—The fact that the plaintiff was convicted by a jury is conclusive; and if apparent in the complaint will be fatal to the suit for damages.[5] Nor will a reversal for error of law prevent the application of the rule. The only exception is when fraud in obtaining a conviction, by means which prevented the plaintiff from setting up his defense, is set up and proved. In a complaint of this nature, an averment of matter tending to show the defendant's motive was held not to be irrelevant.[6] Nor does suffering default have this effect where probable cause existed at the first.[7]

§ 1769. **Corporation.**—An action for malicious prosecution will lie against a corporation if it has power to authorize the act done, and has done so.[8]

[1] Herron v. Hughes, 25 Cal. 560.
[2] M'Henry v. Hazard, 45 Barb. 657.
[3] Mussina v. Clark, 18 Abb. Pr. 188.
[4] Id.
[5] Miller v. Deere, 2 Abb. Pr. 1.
[6] Brockleman v. Brandt, 10 Abb. Pr. 141.
[7] Gordon v. Upham, 4 E. D. Smith, 9.
[8] Vance v. Erie Railway Co., 3 Vroom, 334. See Assault and Battery. That a corporation is not liable to such an action, but may be sued in trespass for false imprisonment, see

§ 1770. **Damages.**—The jury are the proper judges of the amount of damages to be allowed in actions for malicious prosecution.[1] Evidence of the general bad reputation of the plaintiff is admissible in reduction of damages.[2]

§ 1771. **Defective Complaint.**—In an action for malicious issuing and prosecution of a writ of attachment, a defect, if any, in the complaint, is not alleging that it was issued without probable cause, and stating instead that it was issued out of wantonness, is cured by verdict when the defect was not pointed out.[3]

§ 1772. **Essential Averments.**—In an action for malicious prosecution the plaintiff must aver and must prove an entire want of probable cause of the accusation, and actual malice of the defendant in preferring it; that is, malice in fact, as distinguished from malice in law.[4] Both malice and want of probable cause are essential, and must be stated and proved; also, that the prosecution is at an end, and how it was concluded.[5] An averment that the prosecution was without probable cause is indispensable, and its omission fatal,[6] the want of probable cause being the primary question in such actions.[7] For, though malicious, the defendant is not liable unless there be a want of probable cause.[8] The necessity of the concurrence of all three of the above elements, *i. e.*, want of probable cause, malice in fact, and actual determination in favor of the plaintiff, is maintained in numerous cases.[9]

§ 1773. **Facts Only must be Alleged.**—In an action for malicious prosecution, only the substantial matter constituting the action—that is, facts, and not the evidence of facts—need be set out.[10] The point of inquiry in such an action is whether there was in fact probable cause for the prosecution, and not whether the defendant had probable cause to believe there was.[11]

§ 1774. **Gist of Action.**—The action lies against several defendants, and the gist of the action is the malicious prosecution.[12]

Owlsley v. Montgomery R. R. Co., 87 Ala. 560.

[1] Chapman v. Dodd, 10 Minn. 350.

[2] Fitzgibbon v. Brown, 43 Me. 169; see also White v. Tucker, 16 Ohio St. 468.

[3] Levey v. Fargo, 1 Nev. 415.

[4] Bulkeley v. Smith, 2 Duer, 261; Besson v. Southard, 6 Seld. 236.

[5] Brown v. Chadsey, 39 Barb. 253; Hull v. Vreeland, 42 Id. 543; S. C., 18 Abb. Pr. 182; McKown v. Hunter, 30 N. Y. 625.

[6] Lohrfink v. Still, 10 Md. 530.

[7] Grant v. Moore, 29 Cal. 644.

[8] Payson v. Caswell, 9 Shepley, 212; Wood v. Weir, 5 B. Mon. 544; Leidig v. Rawson, 1 Scam. 272.

[9] Vanderbilt v. Mathis, 5 Duer, 304; see also as to pleading, Davis v. Clough, 8 N. H. 157; Weinberger v. Shelly, 6 Watts & Serg. 336; Horton v. Smeltzer, 5 Blackf. 428; Cole v. Hanks, 3 Mon. 208; see also Richardson v. Virtue, 2 Hun, 208.

[10] Dreux v. Domec, 18 Cal. 83.

[11] Hickman v. Griffin, 6 Mo. 37.

[12] Dreux v. Domec, 18 Cal. 83.

§ 1775. **Indebtedness.**—The averment of no indebtedness may be omitted, and a suit maintained for maliciously suing out an attachment.[1]

§ 1776. **Joint Agency, Allegation of.**—In a suit against three defendants for malicious prosecution, the complaint averred that "defendants, contriving and maliciously intending to injure the plaintiff," etc., falsely, maliciously, and without probable cause, procured him to be indicted for murder, it was held that the complaint sufficiently avers a joint agency on the part of defendants in instituting the prosecution.[2]

§ 1777. **Malice.**—Malice and falsehood are essential ingredients in an action for malicious prosecution.[3] Malice, as well as want of probable cause, is necessary to sustain an action for malicious prosecution.[4] Malice, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse.[5] Malice can not be presumed in a prosecution where the defendant has incurred all the moral guilt of the charge, although he may have evaded the penalty of the law.[6] Malice, like fraud, is to be inferred from facts and circumstances.[7] A petition which omits to state that the prosecution was malicious, and that the plaintiff was acquitted, is insufficient.[8] Public policy and security require that prosecutors should be protected by the law from civil liabilities, except in those cases where the two elements of malice in the prosecutor and want of probable cause for the prosecution both occur.[9] If one person arrests another for the commission of a crime, under the belief that the person arrested has committed the crime, the person making the arrest can not be said to act maliciously, although he may act unlawfully.[10]

§ 1778. **Motive.**—In an action for malicious prosecution, the complaint may aver matter tending to show the defendant's motive; *e. g.*, a malicious publication by him procured to be made concerning the prosecutor — such as would be proper to prove at the trial as showing special injury. Such averments should not be stricken out on motion, as the plaintiff can not be deemed aggrieved by them.[11]

§ 1779. **Probable Cause.**—Probable cause may be defined as a suspicion, founded upon circumstances sufficiently strong

[1] Tomlinson v. Warner, 9 Ohio, 103.
[2] Dreux v. Domec, 18 Cal. 83.
[3] Platt v. Niles, 1 Adm. 230.
[4] Riney v. Vanlandingham, 9 Mo. 807; Frissell v. Relfe, Id. 849.
[5] Maynard v. F. Fund Ins. Co., 34 Cal. 48.
[6] Sears v. Hathaway, 12 Cal. 277.
[7] Lyon v. Hancock, 35 Cal. 376.
[8] Mooney v. Kennett, 19 Mo. 551.
[9] Potter v. Seale, 8 Cal. 217.
[10] Lyon v. Hancock, 35 Cal. 372.
[11] Brockleman v. Brandt, 10 Abb. Pr. 141.

to warrant a reasonable man in the belief that the charge is true.[1] It is a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.[2] The question of probable cause does not depend upon whether an offense has been committed, nor upon the guilt or innocence of the accused, but upon the prosecutor's belief of the truth of the charge made by him. If circumstances are shown sufficient to warrant a cautious man in the belief of the truth of the charge he makes, it is enough.[3] And from the want of probable cause, malice may be inferred,[4] and is a mixed question of law and fact.[5] It is a question for the court, but the jury must decide upon the facts.[6]

§ 1780. **Probable Cause, when it Exists.**—If the defendant had a cause of action in the case alleged, although for a much less amount than claimed, there was probable cause, and the court should grant a nonsuit.[7] So a judgment against the plaintiff after trial on the merits is sufficient evidence of probable cause, though subsequently reversed; not, however, conclusive, if impeached for fraud.[8] Where two actions have been abandoned, by the plaintiff's failure to appear at the adjourned day, and a new action has been commenced before another justice for the same demand, which is still pending, the litigation is not terminated, and want of probable cause can not be inferred solely from the discontinuance of the former suits.[9] A committal to await the action of the grand jury is no conclusive evidence of probable cause.[10]

§ 1781. **Privileged Charges.**—As to the remedy by action for malicious prosecution, for false and malicious charges preferred in legal proceedings and deemed privileged from an action for defamation, see the case cited in the note.[11]

§ 1782. **Special Damages.**—Expenses of counsel, made necessary by a malicious prosecution, are to be specially alleged.[12]

§ 1783. **What must be Shown.**—To sustain an action for

[1] Potter v. Seale, 8 Cal. 217; Hall v. Hawkins, 5 Humph. 357; Faris v. Starke, 3 B. Mon. 4; Payson v. Caswell, 9 Shepley, 212; McLellan v. Cumberland Bank, 11 Id. 566; 4 Dana, 120.

[2] Ross v. Innis, 35 Ill. 487.

[3] Scanlan v. Cowley, 2 Hilt. 489; see also Foote v. Milbier, 46 How. Pr. 38; Farnam v. Feeley, 56 N. Y. 451; Carl v. Ayers, 53 Id. 14.

[4] Grant v. Moore, 29 Cal. 644.

[5] Id.

[6] Brant v. Higgins, 10 Mo. 728.

[7] Grant v. Moore, 29 Cal. 644.

[8] Palmer v. Avery, 41 Barb. 290.

[9] Id.

[10] Haupt v. Pohlman, 16 Abb. Pr. 301.

[11] Perkins v. Mitchell, 31 Barb. 461.

[12] Strang v. Whitehead, 12 Wend. 64.

malicious prosecution, the plaintiff must show affirmatively that the prosecution was malicious, and without probable cause, both concurri g.[1]

§ 1784. **When Action will Lie.**—An action for a malicious prosecution will lie where an affidavit for a search warrant is made before a justice, maliciously, and without probable cause, although the magistrate refuse to issue the warrant.[2]

§ 1785. **When Action will not Lie.**—Such an action does not lie where the alleged malicious suit was founded on a just claim, although such claim was smaller than that for which the suit was brought, when it does not appear that property was attached to a greater value than the amount of such claim.[3]

§ 1786. **The Same—Fuller Form.**

Form No. 446.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant appeared before ....., a justice of the peace of said county [or the police ju'ge of said city], and charged the plaintiff, before said justice, with having feloniously stolen a certain ....., of the defendant; and procured said justice to grant a warrant for the arrest of the plaintiff upon said charge.

II. That in so doing, the defendant acted maliciously and without probable cause.

III. That the said justice issued said warrant accordingly, and the plaintiff was arrested and imprisoned under the same for ..... [days or hours, and gave bail in the sum of ..... dollars to obtain his release].

IV. That on the .... day of ....., 18..., the plaintiff was examined before the said justice for the said supposed crime, and the said justice adjudged him not guilty, and fully acquitted him of the same; and that since that time the defendant has not further prosecuted said complaint, but has abandoned the same.

V. That the said charge and the arrest of the plaintiff thereunder were extensively published in several public newspapers, among others the ....., as the plaintiff believes, through the procurement of the defendant.

VI. That by means of the premises the plaintiff was injured in his person, and prevented from attending to his business, and paid ..... dollars costs, counsel fees in defending him-

[1] Cook v. Walker, 30 Ga. 519. [2] Miller v. Brown, 3 Mo. 127.
[3] Grant v. Moore, 29 Cal. 644.

self, and ..... in obtaining bail; and he lost his situation as servant of .....; and many persons, whose names are unknown to the plaintiff, hearing of the said arrest, refused to employ him, and whereby also he has been injured in his good name and reputation, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1787. For Procuring Plaintiff to be Indicted.

Form No. 447.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant caused and procured the said plaintiff to be indicted by the grand jury, then and there impaneled and sworn by the ..... court, in and for the county of ....., to inquire of crimes within and for the said county, and prosecuted and caused to be prosecuted the said indictment against the said plaintiff.

II. That in so doing, the defendant acted maliciously and without probable cause.

III. That afterwards, to wit, at the ..... term of the said ..... court, begun and held on the ..... day of ....., 18..., at the court-house in ....., in the said county of ....., the said plaintiff was in due manner and by due course of law acquitted of the said premises in the said indictment charged upon him, by a jury of the said county of ....., whereupon it was then and there adjudged by the said court that the said plaintiff go hence thereof without day, and the said plaintiff was then and there discharged of and from the premises in said indictment specified, as by the record and proceeding thereof remaining in said court appears.

IV. [State special damages.]

[DEMAND OF JUDGMENT.]

§ 1788. The Same—For Obtaining Indictment on Which a Nolle Prosequi was Afterwards Entered.

Form No. 448.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ... ., 18..., at ....., the defendant procured C. D., then the district attorney in and for the county of ....., in this state, to issue subpœnas for the purpose of compelling and procuring the attendance of wit-

[1] For the law on this subject, see 1 Saund. 228; Purcell v. Macnamara, 9 East, 361; 1 T. R. 493; Anderson v. Buchanan, Wright, 725; Morris v. Scott, 21 Wend. 281; Williams v. Hunter, 3 Hawks, 545; Dennis v Ryan, 63 Barb. 145.

nesses, among others, one A. B., at the .. .. court held on the day last mentioned at ...., in said county, before the grand jury and persons serving as grand jurors at such term of the ..... court, for the purpose of procuring an indictment to be found against the plaintiff, as hereinafter more fully stated.

II. That in so doing the defendant acted maliciously and without probable cause, and intended thereby to injure the plaintiff in his good name and credit, and to bring him into public disgrace, and to cause him to be imprisoned, and to impoverish and injure him.

III. That the defendant at said term of the .... court, complained of the plaintiff before the grand jury, and falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the plaintiff to the grand jury with having [state charge preferred].

IV. That said charge was and is wholly false and untrue, which the defendant then and at all times since well knew.

V. That defendant falsely and maliciously, and without probable cause, procured the grand jury aforesaid to find and present to the said ..... court an indictment against the plaintiff for said alleged [state pretended charge].

VI. That the defendant falsely and maliciously, and without probable cause, procured a bench warrant, directed to the sheriff or any constable of the said county of ...., for the arrest of the plaintiff upon the aforesaid indictment, to answer the charges therein made against him as aforesaid, to be issued by the ..... court of said county of .....; and afterwards, on or about the ..... day of ....., 18..., caused the plaintiff to be arrested and to be kept in custody, restrained of his liberty for the space of ... . months, and to give bail in the sum of ..... dollars to obtain his release.

VII. That the plaintiff did appear at the said term of said ..... court, ready and willing to then and there stand trial upon the aforesaid indictment against him, pursuant to and as required by said bond. Whereupon the aforesaid district attorney, after consulting and advising with the defendant, and at his request, and by his instructions, did then and there move the said court that the plaintiff be discharged out of custody, and be fully discharged and acquitted of the said indictment and of the supposed offense therein charged against him, and be no further prosecuted thereon; whereupon the said court, having heard and considered all that the said defendant and

the people, by the aforesaid district attorney, could say or allege against the plaintiff touching and concerning the said supposed offense, did then and there adjudge, order and determine that the plaintiff be discharged out of custody, and be fully discharged and acquitted of the said indictment, and be not further prosecuted thereon.

VIII. That the said indictment, complaint, and prosecution are, and each of them is, wholly ended and determined in favor of this plaintiff.

IX. [Special damage, if any, as in other cases.]

[DEMAND OF JUDGMENT.]

§ 1789. **Dismissal.**—An immediate dismissal by a magistrate of a prosecution when commenced, is, it would seem, *prima facie* proof of the want of probable cause.[1] Entry of *nolle prosequi* was held insufficient for that purpose.[2]

§ 1790. **The Same—Where Judgment of Acquittal was Rendered.**

Form No. 449

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant caused and procured to be sued out of the ..... court, in and for the county of ....., a certain writ of attachment, in a certain action then and there pending, wherein the said A. B. was plaintiff, and the plaintiff herein was defendant, directed to the sheriff of said county, commanding said sheriff [here state substance of the said writ], and delivered the same to the said sheriff, and caused and required the said sheriff to levy said writ of attachment on the store of goods, wares, and merchandise of the said plaintiff, and took the same into his possession, and the said defendant afterwards applied to the said ..... court [or to Hon. C. D., judge of said court], and obtained an order from said court [or judge] for the sale of said goods and merchandise, and caused said sheriff to sell the same at a great sacrifice.

II. That in so doing the defendant acted maliciously and without probable cause, and unjustly contrived and intended to injure the said plaintiff and break up his business—he, the said plaintiff, then being engaged in business of a merchant.

III. That the said action of the said defendant afterwards

[1] Gould v. Sherman, 10 Abb. Pr. 411.

[2] Bacon v. Townsend, 2 C. R. 51; Hall v. Fisher, 20 Barb. 441; Brown v. Lakeman, 12 Cush. (Mass.) 482; 6 Mod. 261; *contra*, Yocum v. Polly, 1 B. Mon. 358.

came on for trial at the ..... term of said court, 18..., and was tried, and a verdict and judgment rendered in favor of the said plaintiff, to the damage of the said plaintiff ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1791. **Acquittal Essential.**—An action for malicious prosecution can not be maintained until the plaintiff has been acquitted, or the prosecution is finally terminated in his favor. The determination of the prosecuting officer never to bring the indictment to trial, for the reason that he deems the charge entirely unsupported, is not sufficient.[1] The plaintiff's acquittal must be alleged. An allegation that he has been discharged is not sufficient.[2] It is not enough to aver that the prosecuting officer declared the complaint frivolous, and refused to try it.[3] The rule that the prosecution must have terminated favorably to the plaintiff, does not apply in case of an attachment against his property, sued out in his absence, and which he had no opportunity to defend.[4]

§ 1792. **For Malicious Arrest in a Civil Action.**

Form No. 450.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., the defendant, maliciously intending to injure the plaintiff, made affidavit, and procured one A. B. to make an affidavit, in an action brought against this plaintiff by ....., in which he alleged [set forth the grounds of the false arrest]; and that upon said affidavits the defendant caused to be issued an order of arrest against this plaintiff, under which the plaintiff was arrested and imprisoned for the space of ....., and compelled to give bail in the sum of ..... dollars.

II. That in so doing the defendant acted maliciously and without probable cause.

III. That on the .... day of ....., 18..., said order was vacated by said court, upon the ground that [set forth the grounds on which it was vacated].

[Or, III. That on the ..... day of ....., 18..., such proceedings were had in such action, that it was finally determined in favor of this plaintiff, and judgment was rendered for him therein.]

[1] Grant v. Moore, 29 Cal. 644; Thomason v. Demotte, 9 Abb. Pr. 242; S. C., 18 How. Pr. 529.

[2] Morgan v. Hughes, 2 T. R. 225; Bacon v. Townsend, 2 Code R. 51.

[3] Thomason v. Demotte, 9 Abb. Pr. 242.

[4] Bump v. Betts, 19 Wendell, 421.

IV. [Special damage.] That many persons, whose names are unknown to plaintiff, hearing of the arrest, etc. [as in form No. 446], to the damage to the plaintiff ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1793. **Jurisdiction.**—But if a complaint shows that the arrest was without jurisdiction, it may be good as alleging a trespass, without averring a determination in favor of plaintiff.[1]

§ 1794. **Malice.**—If one person arrests another for the commission of a crime, under the be ief that the person arrested has committed the crime, the person making the arrest can not be said to act maliciously, although he may act unlawfully.[2]

§ 1795. **Several Causes of Action United.**—An action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person,[3] as for libel or slander.[4]

§ 1796. **When Action will Lie.**—Where a complaint charged a crime, and the prosecution was instituted before a tribunal having jurisdiction, and a warrant regular upon its face was issued, and the defendant was arrested, an action brought by him for malicious prosecution will be sustained, although the complaint was not signed by the complainant.[5] An action for malicious prosecution will lie against a creditor who effected the arrest and imprisonment of his debtor by alleging that the demand was greater in amount than it truly was, so as to hinder the debtor from getting bail. It is true that in order to sustain an action for malicious prosecution the law requires that the proceedings which form the subject of complaint should have been maliciously instituted, and carried on without any reasonable or probable cause; but there would ordinarily be but little difference in the injury produced to the defendant, whether the unfounded prosecution was carried on without any demand whatever to justify it, or whether it was coupled with a claim of real merit.[6]

§ 1797. **When Action will not Lie.**—An action in a case for malicious prosecution will not lie for causing a person to be arrested on a criminal warrant, charging an act which is not a crime, but merely a trespass, as the warrant was void, and the

[1] Steel v. Williams, 18 Ind. (Kerr), 161; Searll v. McCracken, 16 How. Pr. 262.

[2] Lyon v. Hancock, 85 Cal. 372.

[3] Cal. Code C. P., sec. 427.

[4] Watson v. Hazzard, 8 Code R. 213; Martin v. Mattison, 8 Abb. Pr. 3.

[5] Chapman v. Dodd, 10 Minn. 350.

[6] Phil. on Ev. 261; 3 Barn. & Cress. 139; Dronefield v. Archer, 7 Eng. Com. Law, 177; 26 Eng. L. and Eq. 200; Sommer v. Wilt, 4 Serg. & R. 19; 13 Id. 54; Brown v. McIntyre, 43 Barb. 344.

proper remedy for an arrest on such a warrant is trespass.[1] *Bona fide* acts of a party on advice given by counsel, after a full and fair statement of the facts, is evidence of a probable cause, however erroneous the advice may be.[2]

CHAPTER V.

FOR PERSONAL INJURY CAUSED BY NEGLIGENCE.

§ 1798. For Injuries Caused by Collision of Vehicle Driven by Servant.

Form No. 451.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18...., the plaintiff was driving along the public highway of the city of ....., in a carriage drawn by one horse.

II. That the defendant was then the owner of a wagon and two horses, which were then being driven along said highway, in the possession of defendant [or of defendant's servant].

III. That the defendant [or that said servants] so carelessly drove and managed said horses and wagon, that by reason of his negligence said wagon struck the plaintiff's carriage and overthrew the same, and threw the plaintiff out of his carriage upon the ground [or describe the accident], whereby the plaintiff was bruised and wounded, and was for ..... days prevented from attending to his business, and was compelled to expend ..... dollars for medical attendance and nursing, and ..... dollars for the repair of his said carriage, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1799. Carrier's Contract.—Passenger carriers bind themselves to carry safely those whom they take into their coaches or cars, as far as human care and foresight will go; that is, for the utmost care and diligence of very cautious persons.[3] The words "care, diligence, and foresight" imply a relation to future events.[4]

§ 1800. Damages.—If by the negligent driving of defendant's servant his vehicle runs into another which is driven with due care, and causes the horses of the latter to take fright and

[1] Cramer v. Lott, 50 Penn. 495; but see Dennis v. Ryan, 63 Barb. 145; Newfield v. Copperman, 47 How. Pr. 87.

[2] Richardson v. Virtue, 2 Hun. 208; Eastman v. Keasor, 44 N. H. 518.

[3] Story on Bailments, sec. 601.

[4] Wheaton v. N. B. and M. R. R. Co., 39 Cal. 590; see Civil Code Cal., secs. 2100–2104, inclusive.

run away, and said horse runs into the plaintiff's vehicle and injures him when he is using due care, the damage is not too remote to be recovered.[1] In a case of simple negligence in which the elements of fraud, malice or oppression do not enter, only actual damages can be recovered.[2] In actions of this character, all the circumstances in the case may be taken into consideration in making up the estimate of damages, and the jury are not confined to the actual damages sustained, and where the stage at the time was driven by the servant or agent, the principal is liable only for simple negligence, and exemplary damages can not be imposed.[3] The only damages which can be recovered in such actions are such as are commensurate with the injury alleged to have been sustained, or actual damages.[4]

§ 1801. **Defect of Vehicle.**—A carrier of passengers for hire does not warrant that the carriage in which the passenger travels is roadworthy. He is bound to use all vigilance to insure safety, but is not liable for a defect which could not be detected, and which arises from no fault of the manufacturer.[5]

§ 1802. **Liability for Negligence.**—If a child under four years of age is injured by the negligence of third persons in the street of a city traversed constantly by cars and other vehicles, his father can not recover for loss of service if he has knowingly suffered such child to be in the street unattended.[6] Otherwise of an action by the child itself, although the negligence of a volunteer undertaking to interfere for the child's benefit contributed to the injury.[7] One who sells gunpowder to a child eight years old, knowing that he is unfit to be trusted with it, is liable if the child, using the care of which he is capable, explodes it, and is burned by the same, and a license to sell gunpowder is no defense.[8]

§ 1803. **Master and Servant—General Doctrine.**—The general doctrine is maintained that the master or employer is responsible for the act or omission of the servant or employee within the scope or his employment or authority.[9] One whose

[1] McDonald v. Snelling 96 Mass. 260.

[2] Moody v. McDonald, 4 Cal. 297; Sedg. on Meas. of Dam. 39; Keene v. Lizardi, 8 La. O. S. 390.

[3] The Amiable Nancy, 3 Wheat. 546; Wardrobe v. Cal. Stage Co., 7 Cal. 120.

[4] Greenl. on Ev., sec. 253; Whittemore v. Cutter, 1 Gall. 478; Bateman v. Goodyear, 12 Conn. 580; Dain v. Wycoff, 3 Seld. 193.

[5] Readhead v. Midland R. R. Co., L. R., 4 Q. B. 379; S. C., 2 Q. B. 412; Du Laurans v. St. Paul etc. R. R. Co., 2 Am. R. 107.

[6] Glassey v. Hestonville R. R. Co., 57 Penn. 172.

[7] North Penn. R. R. Co. v. Mahoney, 57 Penn. 187.

[8] Carter v. Towne, 98 Mass. 567.

[9] N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30; Chapman v. N. Y. Cent. R. R. Co., 33 Id. 369; Drew v.

servant negligently throws a keg out of a window, and injures a person passing through a passage-way below, is liable, although such person was there only by license.[1] But the employer is not responsible for a willful injury committed by an employee not within the scope of his employment.[2] For injury by negligence, both employer and employee may be sued together.[3] A municipal corporation is not liable for negligence of members of its paid fire department.[4]

§ 1804. **Against Common Carriers—For Injuries Caused by Overturning Stage-coach.**

Form No. 452.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., the defendant was a common carrier of passengers for hire by stage-coach between ..... and .....

II. That on that day, as such carrier, he received the plaintiff upon his coach, to be carried from ..... to ....., for the sum of ..... dollars, which was then and there paid by the plaintiff to the defendant.

III. That while he was such passenger at ..... [or near ....., or between ..... and .....], the said coach was, by and through the carelessness and negligence of the said defendant, overturned and thrown down, with the plaintiff therein, as aforesaid, by means whereof the said plaintiff was greatly injured, and one of the legs of said plaintiff was broken, and fractured, and bruised, and the said plaintiff was otherwise greatly injured, wounded, and cut, insomuch that the said plaintiff then became sick, lame, and sore, and so continued for the space of ..... months thence next ensuing, and was during all that time prevented from attending to his business and carrying on the same; and the said plaint ff was forced to expend, and did expend, the sum of ..... dollars for medical attendance and nursing, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1805. **Essential Averments.**—It is only necessary to prove the overturn and the injuries sustained. The presumption of law is, that the overturn occurred through the negli-

Sixth Av. R. R. Co., 26 Id. 49; Lannen v. Albany Gas Light Co., 46 Barb. 264; Carman v. Mayor of N. Y., 14 Abb. Pr. 301; Annett v. Foster, 1 Daly, 502; Meyer v. Second Av. R. R. Co., 8 Bosw. 305; Merrick v. Brainard, 38 Barb. 574. Not affected by partial reversal: Merrick v. Van Santvoord, 34 N. Y. 208.

[1] Corrigan v. Union Sugar Refinery, 98 Mass. 577.

[2] Garvey v. Dung, 30 How. Pr. 315.

[3] Phelps v. Wait, 30 N. Y. 78.

[4] Howard v. S. Francisco, 51 Cal. 52.

gence of the defendant.[1] In an action on the case for an injury sustained by the upsetting of a stage-coach, the declaration alleged that the plaintiff, at the special instance and request of the defendants, became a passenger in a certain coach, to be carried safely, and for certain rewards to the defendants; and that thereupon it was their duty to use due and proper care that the plaintiff should be safely conveyed. The breach was well assigned, showing the neglect and consequent injury sustained; and it was held that the defect, if any, was cured by section 32 of the judiciary act, which provides that no litigant shall lose his right in law for want of form.[2] In an action for an injury sustained by the upsetting of defendant's stage-coach, the plaintiff alleged that he paid for his passage the sum of ten dollars; this was held to be a material allegation.[3]

§ 1806. **Overturning Plaintiff's Carriage.**—In a case for personal injuries caused by plaintiff's horse being frightened by two loud, sudden, and sharp whistles from defendant's engine, and upsetting his carriage, it was held that whether or not the above was a proper signal in the use of ordinary care was for the jury. A verdict for the plaintiff was upheld.[4]

§ 1807. **Paid Fare.**—Carriers can not protect themselves from liability for gross negligence, by contract.[5] It is otherwise when the passenger is carried free.[6]

§ 1808. **Railroad Company.**—An action lies against a city railroad company for the negligence of their driver in respect to stopping the car and assisting young and infirm persons on.[7]

§ 1809. **Stock Running at Large.**—Plaintiff was driving in the highway, using due care, when defendant's hog running at large, contrary to the statute, frightened plaintiff's horse, and his minor daughter was injured in consequence; it was held that defendant was liable, although he did not know that the hog was at large.[8]

§ 1810. **Who Liable.**—Where one owning a carriage hires horses and a driver of B., for an injury resulting from the carelessness of the driver, B. alone is liable.[9] A municipal corpora-

[1] Boyce v. Cal. Stage Co., 25 Cal. 460.

[2] Stockton v. Bishop, 4 How. U. S. 155; see also Washington v. Ogden, 1 Black, 450.

[3] Harris v. Rayner, 8 Pick. 541.

[4] Hill v. Portland R. R. Co., 55 Me. 438.

[5] Illinois Cent. R. R. Co. v. Adams, 42 Ill. 474; see Adams Exp. Co. v. Haynes, Id. 89, 98.

[6] Kinney v. Cent. R. R. Co., 3 Vroom, 407; but see Penn. R. R. Co. v. Butler, 57 Penn. 335.

[7] Drew v. Sixth Avenue R. R. Co., 3 Keyes, 429.

[8] Jewett v. Gage, 55 Me. 538.

[9] Quarman v. Burnett, 6 M. & W. 497; Rapson v. Cubitt, 9 Id. 709; Hobbitt v. N. W. R. R. Co., 4 Welsh, Hurlst. & Gord. 254; Allen v. Hayward, 7 Adol. & Ellis (N. S.) 960.

tion is liable for injuries ensuing from neglect of its employees or officers.[1] The fact that the driver of the carriage and horses was their owner was conclusive in establishing that the relation of master and servant did not exist; and so far as the defendant's liability rested upon the existence of such relation he was not responsible for the injury which the plaintiff received through the negligence of the driver.[2]

§ 1811. Against a Railroad for Injuries by Collision.

Form No. 453.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ...., 18..., the defendant was a corporation duly incorporated under the laws of this state, and was the owner of a certain railroad, known as the ..... railroad, together with the track, rolling stock, and other appurtenances thereto belonging; and was a common carrier of passengers thereupon for hire, between ..... and ....., in the state of .....

II. That on that day the defendant, in consideration of the sum of ..... dollars, then paid to it by the plaintiff therefor, undertook and agreed, as such common carrier, to transport and convey the plaintiff from ..... to ....., as a passenger, and the plaintiff thereupon entered one of the cars of the defendant to be so conveyed as aforesaid from ..... to ..... aforesaid.

III. That while he was such passenger, at .... [or near the station of ...., or between the stations of ..... and .....], a collision occurred on the said railroad caused by the negligence of the defendant and its servants, whereby the plaintiff was much injured [state the injury according to fact, and the special damage, if any].

[Or, III. That the defendant and its servants, in managing said cars in which plaintiff was a passenger, were so careless and negligent that it was unsafe for him to remain in one of them; and that in order to free himself from the danger, he was obliged to leap from the car, and in doing so was injured] [state injury according to the fact.]

IV. By means whereof the plaintiff hath been damaged in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

[1] Lloyd v. Mayor of N. Y., 1 Seld. 369; *contra*, Howard v. San Francisco, 51 Cal. 52.

[2] Boniface v. Relyea, 5 Abb. Pr. (N. S.) 259.

§ 1812. **Degrees of Negligence.**—Degrees of negligence are matters of proof and not of averment; and a general allegation of negligence, want of care and skill, etc., is sufficient in an action for injuries caused by such negligence, whether the defendant is liable for ordinary or gross negligence.[1] And an averment of malice does not vitiate the pleading.[2]

§ 1813. **Diligence.**—The same diligence is not required from a railroad company toward a stranger as toward a passenger. The care required is that which experience has found reasonable and necessary to prevent injury to others in like cases.[3] A railroad company is not liable for injuries received by a passenger while voluntarily and unnecessarily standing on the platform of a car in motion, although by the express permission of the conductor and brakeman.[4]

§ 1814. **General Averment of Negligence.**—Ordinarily a general averment of negligence is sufficient to admit proof of the special circumstances constituting it. Thus, in an action against a railroad company for running over a child, evidence is admissible under such a general averment that there were no suitable brakes or guards in front of the car where the driver was stationed.[5]

§ 1815. **Negligence Generally, and also Specific Acts.** Under a complaint alleging negligence generally, and also specifying particular acts of negligence, evidence of any other kinds of negligence is admissible; the general allegation being sufficient, the particular charges, being surplusage, should not affect the reception of evidence.[6] Negligence is a question of fact, or of mixed law and fact; and in pleading it is only necessary to aver negligence generally, not the specific facts constituting the negligence.[7]

§ 1816. **Particular Facts.**—The complaint in an action against a railroad company, for running over a person with an engine, need not show the particular facts constituting negligence on the part of the defendant, if it charges such negligence in a general way. Such complaint must show that there was no fault on the part of the person run over.[8]

[1] Nolton v. Western R. R. Co., 15 N. Y. 444.

[2] Winterson v. Eighth Avenue R. R. Co., 2 Hilt. 389; Robinson v. Wheeler, 25 N. Y. 252.

[3] Baltimore and Ohio R. R. Co. v. Breinig, 25 Md. 378; see Philadelphia, W. and B. R. R. Co. v. Kerr, Id. 521.

[4] Hickey v. Boston and L. R. R. Co., 96 Mass. 429.

[5] Oldfield v. New York and Harlem R. R. Co., 14 N. Y. 310.

[6] Edgerton v. New York and Harlem R. R. Co., 35 Barb. 389.

[7] McCauley v. Davidson, 10 Minn. 418.

[8] Indianapolis etc. R. R. Co. v. Keeley's Adm'r, 23 Ind. 133; St. Louis etc. R. W. Co. v. Mathias, 50 Id. 65.

§ 1817. **Several Acts of Negligence.**—If the plaintiff would rely on several acts of negligence as the cause of one injury, he may allege all the acts of negligence in one count, and aver that they were the cause; and if he prove upon the trial that any one of them was the cause, his complaint is sustained.[1]

§ 1818. **Sufficient Averment of Negligence.**—In an action against a railroad company for injuries caused by a collision with its cars, a complaint which alleges that the defendant, with carelessness and with gross negligence, caused one of its engines to run upon the track, etc., sufficiently charges negligence.[2]

§ 1819. **Without the Bounds of the State.**—An action can not be maintained under the statute of a wrongful act causing death, where such act occurred without the bounds of the state.[3]

§ 1820. **The Same—By Car Running off Track.**

Form No. 454.

[TITLE.]

The plaintiff complains, and alleges:

I. [Same as in preceding form.]

II. That on that day the defendant received the plaintiff as a passenger in one of the carriages of the defendant on said road, to be transported from ..... to .....

III. That while he was such passenger, at ....., the said defendant, not regarding its duty in that behalf, did, by its servants and agents, so carelessly, negligently, and unskillfully, conduct the running of said cars and railroad, that, on the day and year aforesaid, by the carelessness, negligence, and default of its said agents and servants, and for want of due care and attention to its duty in that behalf, the said car was run off the track of said railroad, and thrown down the embankment thereof, whereby the said plaintiff was greatly cut, bru sed and wounded, so that he, the said plaintiff, became and was sick, lame, and unable to walk, and was wholly unable to attend to the transaction and performance of his usual and necessary business, and so continued from thence hitherto; and said plaintiff has been put to great expense, to wit, to the amount of ..... dollars in endeavoring to cure his said wounds, bruises, and fractures, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

[1] Dickens v. N. Y. Cent. R. R. Co., 13 How. Pr. 228

[2] Ohio etc. R. R. Co. v. Davis, 23 Ind. 553.

[3] Mahler v. Norwich and New York Transportation Company, 45 Barb. 226.

§ 1821. **The Same—By Negligently Starting Cars without Giving Passenger Opportunity to Get Off.**

Form No. 455.

[TITLE.]

The plaintiff complains, and alleges:

I. II. [Same as in form No. 453.]

III. That while plaintiff was such passenger, and at the ..... station of said railroad, when in the act of getting out of and off from said car and being still thereon, to wit, on the platform thereof, the said car was, through the neglect of the servant of said defendant, suddenly started and put in motion, without allowing said plaintiff sufficient time to safely get off, and in consequence thereof, and in consequence of the defect and insufficiency of said company's said platform, and of the couplings connecting said car with the other cars of the same train, and of the defective and insufficient guards around said platform, and across the passage-way leading therefrom to the next adjacent car, and in further consequence of the insufficient and imperfect means provided for giving the alarm, preparatory to starting said train, and of the negligence and carelessness of the servants of said defendant, in the running and conducting of said train, the said plaintiff was violently thrown on the track between the cars of said defendant, and sustained great injury, to wit, one of his feet was crushed by a wheel of one of said cars passing over it, so that its immediate amputation became necessary, and it was accordingly amputated.

IV. That in the act of getting off from said car, as aforesaid, the plaintiff exercised and observed all due and proper care and precaution.

V. [Allegation of any special damages.]

[DEMAND OF JUDGMENT.]

§ 1822. **For Injuries Caused by Negligence on a Railroad, in Omitting to Give Signal.**

Form No. 456.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., the defendant was a corporation duly incorporated under and pursuant to the laws of this state, and was the owner of a certain railroad, known as ..... railroad, together with the track, rolling stock, and other appurtenances thereto belonging.

II. That on that day the plaintiff was traveling in a carriage along the public highway, from ..... to ....., which public highway crosses the railroad aforesaid, at ..... , and

as the plaintiff had reached said crossing, the defendants carelessly and negligently caused one of their locomotives [with a train of cars attached thereto] to approach said crossing, and then and there to pass rapidly over the track of said railroad, and negligently and carelessly omitted their duty while approaching said crossing, to give any signal by ringing the bell or sounding the steam-whistle, by reason whereof the plaintiff was unaware of their approach.

III. That in consequence thereof, the locomotive struck the plaintiff's horse, and overset the plaintiff's carriage, and plaintiff was thrown out upon the ground with such force as to fracture his left arm [or other injuries].

IV. That thereby the plaintiff was put to great pain, and was and still is prevented from going on with his business as ....., and is, as he believes, permanently injured, and was otherwise greatly injured, and was compelled to expend ..... dollars for medical attendance and nursing, to his damage .... dollars.

[DEMAND OF JUDGMENT.]

§ 1823. **Omission of Duty.**—The facts which are relied on as raising a duty must be alleged where the negligence consists in the omission of a duty.[1] An existing duty or obligation is an essential and necessary prerequisite or predicate of an affirmation of neglect or failure to perform.[2] Neglect to ring the bell for the entire distance required by law does not necessarily make the company liable, if the bell was rung or whistle sounded for such a distance from the crossing as to give the deceased timely and sufficient warning of the approaching train to prevent him from trying to cross the track.[3]

§ 1824. By Steamboat Explosion.

Form No. 457.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the defendants were common carriers of passengers for hire, between ..... and....., and were the proprietors of a steamboat, named the ....., employed by them in carrying passengers and merchandise on the ..... river, from ..... to ....., for hire.

[1] City of Buffalo v. Holloway, 7 N. Y. (3 Seld.) 493; affirming S. C., 14 Barb. 101; Taylor v. Atlantic Mutual Insurance Company, 2 Bosw. 196; Congreve v. Morgan, 4 Duer, 439; Seymour v. Maddox, 16 Q. B. 326; S. C., 71 Eng. Com. L. 326; and see McGinity v. Mayor etc., 5 Duer, 674.

[2] Eustace v. Jahns, 38 Cal. 3; O'Brien v. Capwell, 59 Barb. 497.

[3] Cook v. N. Y. Cent. R. R. Co., 5 Lans. 401; but see Robinson v. W. P. R. R. Co., 48 Cal. 410.

II. That on the ..... day of ..... , 18..., the defendants received the plaintiff and his wife and daughter into said boat for the purpose of safely conveying them therein as passengers, from ..... to ....., for ..... dollars, paid to them by the plaintiff therefor.

III. That the defendants so negligently and unskillfully conducted themselves, and so misbehaved in the management of said boat, that, through the negligence and unskillfulness of themselves and their servants, the steam escaped from the boiler and engine, and burned or scalded [otherwise state injury, according to the facts], the plaintiff and his wife and daughter.

IV. That in consequence thereof, the plaintiff and his said wife and daughter became, and for a long time remained ill; the plaintiff was deprived, and for a long time to come will be deprived, of the assistance and services of his wife and daughter, and was compelled to, and did expend ..... dollars in attempting to cure himself and his wife and daughter, and was for ..... months prevented from pursuing his business, and was otherwise greatly injured, to his damage ..... dollars.

[Demand of Judgment.]

§ 1825. **Condition of Boiler.**—The certificate of an inspector does not discharge the liability of the owner of a boiler to the party injured by its bursting.[1]

§ 1826. **Master and Servant.**—The owner of water-craft is not liable for the injury willfully committed by the master or pilot running her.[2]

§ 1827. **Negligent Delay.**—A transportation company is liable to a passenger for injury occasioned by negligent delay.[3]

§ 1828. **Negligence in Navigating Water-craft.**—The plaintiff in an action for damages for injuries caused by negligence in sailing water-craft, must show that he used ordinary care.[4]

§ 1829. **Rule of Damages.**—Where the collision occurs without negligence of either party, each must bear his own loss.[5]

[1] Swarthout v. New Jersey Steamboat Co., 46 Barb, 222.

[2] Turnpike Co. v. Vanderbilt, 1 Hill, 480.

[3] Van Buskirk v. Roberts, 31 N. Y. 661.

[4] Barnes v. Cole, 21 Wend. 188; Holderman v. Beckwith, 4 McLean, 286; Rathbun v. Payne, 19 Wend. 399; Steamboat United States v. Mayor etc., 5 Mo. 230; Simpson v. Hand, 6 Whart. 311; Steamboat Clipper v. Logan, 18 Ohio, 375.

[5] Stainback v. Rae, 14 How. U. S. 532; Williamson v. Barrett, 13 Id. 101; Halderman v. Beckwith, 4 McLean, 286; Barrett v. Williamson, Id. 589; 4 Harring. 228; The Big Veruma v. Clara, 1 Tex. 30.

§ 1830. **Rules of Navigation.**—Steam vessels are bound to keep clear of sailing vessels; they are treated as having wind in their favor.[1]

§ 1831. **For Injuries to Engineer of a Railroad Company, Caused by a Collision.**

Form No. 548.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., ..., the defendant was a corporation, duly incorporated under and pursuant to the laws of the state of California, and was owner of a certain railroad known as ..... railroad, together with the track, cars, and locomotives thereto belonging.

II. That one of said locomotives, and the train thereto attached, ran from ..... to ....., and back again, each day; and another thereof ran from ..... to said ..... and back again, each day; which said locomotives, with their respective trains, were used and accustomed to meet, and safely pass each other, at .....

III. That the said plaintiff was employed by the said defendant as an engineer upon one of said locomotives, at and for a certain hire and reward agreed upon by the parties in that behalf, and was accustomed to stop the said last mentioned locomotive at ..... aforesaid, under the instruction by him received from the said defendant, and there to pass the said other locomotive as aforesaid.

IV. That by reason of the premises it became the duty of the said defendant to give the said plaintiff due notice of any change in the place of meeting and passing of the said locomotives and their respective trains, yet the said defendant, not regarding its said duty, did, on the ..... day of ....., 18 .., change the place of meeting and passing of said locomotives, with their respective trains, from said ..... to said ....., and did direct said change to be carried into effect on the ..... day of ....., 18...

V. That the said defendant wholly neglected and failed to give the said plaintiff notice of said change in the place for the passing of said locomotives with their respective trains, and whilst the said plaintiff was proceeding, in his capacity of engineer as aforesaid, on one of said locomotives, with the train thereto belonging, according to the directions before that time

[1] St. John v. Paine, 10 How. U. S. 583; Newton v. Stebbins, 10 Id. 586; The Europa, 2 Id. 557; Western Belle v. Wagner, 11 Mo. 30.

given to the said plaintiff by the said defendant, between .... and ..... aforesaid, the other locomotive with its train, coming from ..... to ....., ran against it, and violently crushed the same.

VI. That by reason thereof the plaintiff was severely scalded, bruised, burnt, and wounded, and became sick, sore, lame, and disordered, and so remained for the space of ..... months, and was compelled to expend the sum of .... dollars for medical attendance; and was prevented from attending to his ordinary business, and lost all the wages he otherwise would have earned, to wit, the sum of ..... dollars, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1832. **Company, when not Liable.**—The fact that a railroad company's servant was of a higher grade than another servant of said company, injured through his negligence, does not make the company liable.[1]

§ 1833. **Employer, when Liable.**—If injury to the employee results from fault or negligence on the part of the employer, the employer is liable.[2] But if such injury results from defects in machinery, etc., notice of such defect must be brought home to the employer.[3] An allegation that defendant "negligently provided" such machinery, is held a sufficient averment of knowledge.[4]

§ 1834. **Joinder of Parties.**—Master and servant may be joined as defendants in an action to recover for the negligence of the servant.[5]

§ 1835. **Mutual Negligence.**—The rule that the plaintiff can not recover if his own wrong as well as that of the defendant conduced to the injury, is confined to cases where his wrong or negligence has immediately or approximately contributed to the result.[6] A slight want of care on the part of the plaintiff will not excuse gross negligence by the defendant.[7]

§ 1836. **Want of Ordinary Care.**—In Indiana, in an action against a railroad company by one of its servants to recover for injuries received through the negligence of another servant, the

[1] Shauck v. Northern Central R. R. Co., 25 Md. 462; Cumberland Coal and Iron Co. v. Scally, 27 Md. 589; McLean v. Blue Point Gravel Min. Co., 51 Cal 255.

[2] Ryan v. Fowler, 24 N. Y. 410; Connolly v. Poillon, 41 Barb. 366.

[3] Kunz v. Stewart, 1 Daly, 431; Loonam v. Brockway, 28 How. Pr. 472.

[4] Knaresborough v. Belcher S. M. Co., 3 Sawyer, 446.

[5] Montfort v. Hughes, 3 E. D. Smith, 591.

[6] Kline v. C. P. R. R. Co., 37 Cal. 400; citing Needham v. San Francisco and S. J. R. R. Co., 37 Id. 409.

[7] Baquette v. People's Trans. Co., 2 Or. 200.

complaint must allege, either expressly, or by stating facts from which it clearly appears, that the plaintiff did not by his own fault or negligence contribute to the injury.[1] Generally, however, it is not necessary for the plaintiff to allege in his complaint that the injury happened without any want of ordinary care on his part; except where the facts alleged are such as to raise a presumption of such fault in him.[2]

§ 1837. For Injuries to Engineer of a Railroad Company—Said Company having Used a Condemned Locomotive.

Form No. 459.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., the defendant was a corporation, duly incorporated under and pursuant to the laws of the state of ....., and was the owner of a certain railroad, and of a locomotive propelled by steam on said railroad, and by said defendant used and employed in carrying and conveying passengers and goods [or hauling trains of cars containing passengers and goods], upon and over the said railroad of the said defendant, from ..... to .....

II. That the said plaintiff on the day and year aforesaid, at ..... aforesaid, and at the time of the committing of said grievances, was in the employ of the said defendant, as engineer upon said locomotive, so moved and propelled by steam as aforesaid; and that it then and there became and was the duty of the said defendant to procure a good, safe, and secure locomotive, with good, safe, and secure machinery and apparatus, to move and propel the same as aforesaid.

III. That the said defendant conducted itself so carelessly, negligently, and unskillfully, that, by and through the carelessness, negligence, and default of the said defendant and its servants, it provided, used, and suffered to be used, an unsafe, defective, and insufficient locomotive, of all which it had notice.

IV. That for want of due care and attention to its duty in that behalf, on the said ..... day of ....., 18..., at ....., aforesaid, and whilst the said locomotive was in the use and

[1] Evansville R. R. Co. v. Dexter, 24 Ind. 411.

[2] Johnson v. Hudson River R. R. Co., 5 Duer, 21; S. C., 20 N. Y. 65; Wolfe v. Supervisors of Richmond, 11 Abb. Pr. 270; S. C., 19 How. Pr. 370; Burdick v. Worral, 4 Barb. 596; Holt v. Whatley, 51 Ala. 569; Texas & P. R. W. Co. v. Murphy, 46 Texas, 356; Robinson v. W. P. R. R. Co., 48 Cal. 409; *contra*, Louisville etc. R. Co. v. Boland, 58 Ind. 398; see also Chicago & N. W. R. Co. v. Coss, 73 Ill. 394.

service of said defendant, upon said railroad, and whilst the said plaintiff was on the same, in the capacity aforesaid, for the said defendant, the boiler connected with the engine of the said locomotive, by reason of the unsafeness, defectiveness, and insecurity thereof, exploded; whereby large quantities of steam and water escaped therefrom, and fell upon the said plaintiff, by which he was greatly scalded, burnt, and wounded, and became sick, sore, and disordered, and so remained for the space of ..... months, and was compelled to expend the sum of ..... dollars for medical attendance, and was prevented from attending to his ordinary business, and lost all the wages he otherwise would have earned, to wit, the sum of ..... dollars, to his damage ..... dollars.[1]

[Demand of Judgment.]

§ 1838. **Company Liable for Acts of Servants.**—It has been held in a case where men are in the employ of a manufacturing company, that where an injury is suffered through the gross carelessness of the agent of the company, the company is not liable in damages, where both the injured party and the agent through whose neglect the injury was caused, were engaged in their respective duties.[2] It has been the opinion in a large number of cases very similar to those referred to, that the inquiry should be made, "Did the accident happen through the fault of the company or the fault of its servants?" and if through the fault of the servants, and without any fault on the part of the company, then it would not be liable. In the case of Keegan v. Western Railroad Corporation, 4 Seld. 175, it was held that the defendant was liable, on the ground that the neglect was that of the corporation, and not of its servants, and so did not come within the principle established in Coon v. S. & U. R. R. Co., 1 Id. 492. The locomotive in this case had been reported as insufficient by the engineers, but the corporation continued to use it; hence it was the fault of the corporation, and not of its servants. Where the injury was alleged to have been caused by the negligence of an engineer who was employed by a superintendent who had full authority and control of the work, and employed and discharged the workmen, the

[1] The above form is partially taken from Nash's Pleadings and Forms, and is here given, although there are grave doubts about an action lying against the railroad company in a case of that character. This action was, however, sustained by the Supreme court of the state of Ohio, in Little Miami Railroad Co. v. Stevens, 20 Ohio, 415. But it seems the court in McGlynn v. Brodie, 31 Cal. 376, holds to a different doctrine.

[2] Albro v. Agawam Canal Co., 6 Cush. 75.

complaint must also allege that the defendants were negligent in the selection of their superintendent, or it does not state a cause of action against them.[1]

§ 1839. **Liability of Master.**—A master is bound to use reasonable care and diligence to prevent accident or injury to his servant, in the course of his employment, and is responsible in damages for failure to do so.[2] A common employer is not responsible for the injury to one servant, occasioned by the negligence of another, in the course of their common employment, unless he himself was in fault.[3] A railroad company having employed competent persons to supervise and inspect its roadbed and bridges, is not liable for an injury to one of its servants, caused by the falling of a bridge, in consequence of a latent defect.[4]

§ 1840. **Risk of Employee.**—In a California case it is held, that "if an employee works with or near machinery which is unsafe, and from which he is liable to sustain injury, with a knowledge or means of knowing its condition, he takes the risk incident to the employment in which he is thus engaged, and can not maintain an action for injuries sustained arising out of accident, resulting from such defective condition of the machinery."[5]

§ 1841. **By Executor or Administrator, against a Railroad Company, for Injuries Causing Death.**

Form No. 460.

[TITLE.]

The plaintiff, as the executor [or administrator] of the estate of A. B. deceased, complains and alleges:

I. That on the ..... day of ....., 18.., the defendant was a corporation duly organized by [or under] the laws of this state and was a common carrier of passengers for hire, by railroad, between ..... and .....

II. That on that day said defendant received one A. B. into its cars, for the purpose of conveying him therein as a passenger from ..... to ..... [for ..... dollars paid to them by said A. B.]

[1] Collier v. Steinhart, 51 Cal. 116.

[2] Hallower v. Henley, 6 Cal. 209.

[3] Wright v. N. Y. Central R. R. Co., 25 N. Y. 562; Treadwell v. Mayor of New York, 1 Daly, 123; Kunz v. Stuart, Id. 431.

[4] Warner v. Erie Railway Co., 39 N. Y. 468; see Cal. Civil Code, secs. 1969–1971, inclusive.

[5] McGlynn v. Brodie, 31 Cal. 376; see McGatrick v. Wason, 4 Ohio St. 569; Hayden v. Smithville Mfg. Co., 29 Conn. 558; William v. Clough, 3 Hurlst. & N. 258; Griffiths v. Gidlow, Id. 648; Dynen v. Leach, 40 Eng. L. & E. 491; Skipp v. Eastern Counties Railway Co., 9 Ex. 223; Story on Agency, 6th ed., sec. 453, and notes; Hallower v. Henley, 6 Cal. 209.

III. That while he was such passenger, at ....., a station on the line of the said railroad, by and through the carelessness of the defendant and its servants, a collision occurred by which [the cars of said railroad were thrown from the track, and the car in which the said A. B. then was was precipitated down an embankment, and the said A. B. was thereby killed, or as the case may be].

IV. That on the ..... day of ....., 18..., letters of administration upon the estate of the said A. B. were duly issued by the probate court of the county of ..... to the plaintiff, by which he was appointed administrator of all the goods and credits belonging to the said A. B. at the time of his death, and he thereupon was qualified and entered upon his duties of such administration.

V. That by reason of the premises the plaintiff, as such executor [or administrator], hath sustained damage in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1842. **By Heirs, against Railroad, for Injuries to Employee Causing Death, Resulting from Defective Machinery.**

Form No. 461.

[TITLE.]

The plaintiffs complain, and allege:

I. That the plaintiff, Mary Doe, is the widow of John Doe, deceased; that said plaintiff and said deceased intermarried on the ..... day of ....., 18...

II. That the plaintiff, James Doe, is the only child of said John Doe, deceased; that the plaintiff, James Doe, is an infant, less than ..... years of age; that before the commencement of this action said Mary Doe, his mother, was by an order of the superior court of ..... county, duly made and given, appointed guardian *ad litem* of said infant, for the purpose of appearing for him in this action.

III. [Allege defendant's corporate existence and business, as in form No. 469.]

IV. That on or about the ..... day of ....., 18..., said defendant was the owner of, and engaged in running and operating a railroad and train of cars in the county of ....., state of .....

V. That on said day, and at the time of the injuries hereinafter mentioned, said John Doe, deceased, was employed and hired by the defendant as a brakeman on said train, and was then and there acting as and discharging the duties of such brakeman.

VI. That at the time aforesaid one of the brake wheels and brake machinery on said train, which said John Doe, as such brakeman, was required to operate, was imperfectly constructed, defective, and unsafe; that said imperfection, defectiveness, inadequacy, and unsafeness could have been by said defendant discovered and known by the use and exercise by them of ordinary care and diligence, and were at the time aforesaid known to said defendant; but the same were unknown to the said John Doe.

VII. That at the time aforesaid, and while said John Doe was employed and engaged in the duties and occupation of brakeman, as aforesaid, said brake wheel and brake machinery, by reason of the imperfection, defectiveness, inadequacy, and unsafeness thereof, broke and gave way, without any negligence or fault of said John Doe, by reason whereof said John Doe was cast upon the ground, and there crushed and killed by said train.

VIII. That said plaintiffs were wholly dependent upon said John Doe for subsistence and support, and by reason of his death are left utterly helpless and destitute, and are damaged in the sum of ..... dollars.

[Demand of Judgment.]

§ 1843. **Conflict of Laws**—An administrator appointed in one state can not maintain an action there, on the statute of another state, which gives to the personal representatives of a person killed by wrongful act, neglect, or default, a right to maintain an action for damages in respect thereof, notwithstanding the death, for the benefit of the widow or next of kin, against the party that would have been liable if death had not ensued.[1]

§ 1844. **Damages.**—Damages ensuing from bodily pain need not be alleged specially in the complaint.[2] But funeral expenses are not recoverable, except as special damages, if recoverable at all, and must be specially pleaded.[3]

§ 1845. **Liability for Causing Death.**—When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the

[1] Richardson v. New York Cent. R. R. Co., 98 Mass. 85.

[2] Curtiss v. Rochester and Syracuse R. R. Co., 20 Barb. 282; affirmed 18 N. Y. (4 Smith), 534.

[3] Gay v. Winter, 34 Cal. 153. As to measure of damages in case of the death of a woman having children, see Tilley v. Hudson River R. R. Co., 29 N. Y. 252; S. C., 24 Id. 471; McIntyre v. N. Y. Cent. R. R. Co., 43 Barb. 532. As to the rule for pleading special damages, see *ante*, sec. 826.

death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.[1] In the case of a minor, the father, or where he is dead or has deserted his family, the mother, or the guardian of a ward may bring the action.[2]

§ 1846. **Limitation of Action.**—In California, every action for the death of a person by wrongful act shall be commenced within two years after the death of such deceased person.[3]

§ 1847. **Negligence.**—Where the complaint alleged that a car of the defendant, in charge of their servant and agent, was wrongfully driven over a child, whereby, etc., and that the defendants, by negligence of themselves and their agents, ran over the child and caused her death, it was held that evidence was admissible of any facts of negligence on the part of the defendants in the construction of the cars, which would have aided in causing such injury.[4]

§ 1848. **Parties Plaintiff.**—A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child; and so may a guardian for the injury or death of his ward.[5] A parent may recover the expenses of nursing and healing a minor child, even though the child be so young that there is no loss of service.[6] An action may be maintained by a father as administrator of an unmarried infant son, and it is not indispensable that deceased should leave a widow and next of kin.[7] A husband can not maintain an action for the instantaneous killing of his wife through the negligence of defendant. The well settled common-law rule that no damages can be recovered by action for injuries resulting in immediate death applies to actions brought by a husband for injury to his wife. The loss of society and assistance does not alter the case; and the New York statute of 1847 has not extended the remedy to such an injury.[8] An action in Pennsylvania against a railroad company for negligence in causing the death of a father, is properly brought in the name of all the children. The recovery is for the benefit of all, the amount to be distributed as in case of intestacy.[9]

[1] Cal. Code C. P., sec. 377.
[2] Id., sec. 376.
[3] Id., sec. 339, sub. 3.
[4] Oldfield v. N. Y. and Harlem R. R. Co., 3 E. D. Smith, 103.
[5] Cal. Code C. P., sec. 376.
[6] Sykes v. Lawler, 49 Cal. 236.
[7] McMahon v. Mayor of N. Y., 33 N. Y. 642.
[8] Green v. Hudson River R. R. Co., 2 Keyes, 294; affirming 28 Barb. 9.
[9] North Penn. R. R. Co. v. Robinson, 44 Penn. St. 175.

§ 1849. **Parties Defendant.**—In New York, a passenger in a vehicle or railroad car, injured by its collision with another vehicle or car, resulting from the concurrent negligence of the owners of such vehicles or cars, or their employees, may maintain a joint action against both.[1]

§ 1850. **Personal Representatives.**—Every action for the death of a person, caused by the wrongful act, neglect, or default of a person or corporation, shall be brought by and in the names of the personal representatives of such deceased person.[2] The provision of the Louisiana statute, that the cause of action for the wrongful death of a person shall survive to the personal representatives for the space of one year from the death, is a legal subrogation, in favor of the persons designated to the right of action of the deceased; and in case of a suit under that subrogation, the plaintiff should allege that his cause of action was derived from deceased under the statute, and a neglect to do this will be fatal.[3]

§ 1851. **Special Damage.**—In an action for death by the wrongful act of a person, it is not necessary to allege or prove special damage.[4]

§ 1852. **What must be Shown.**—To maintain an action for causing by wrongful acts the death of or injury to a person two things must be shown: 1. An obstruction in the road by the fault of the defendant; 2. No want of ordinary care on the part of the plaintiff or party injured. The *gravamen* of the action is the negligence of the defendant, and plaintiff can not recover where it appears that the negligence of the deceased or person injured contributed in any degree to the death or injury sustained.[5] But in cases where the negligence of the defendants is affirmatively shown, and there is no proof of the conduct of the deceased or person injured, the jury are at liberty to infer ordinary care and diligence on his part, taking into consideration his character and habits as proved, and the natural instinct of self-preservation.[6] In such actions, if the plaintiff makes a case which does not charge the deceased or the person injured with negligence, the case should be permitted to go to the jury, under appropriate instructions.[7]

[1] Chapman v. New Haven R. R. Co., 19 N. Y. 341; Colegrove v. N. Y. & N. H. R. R. Co., 20 Id. 492; Webster v. H. R. R. R. Co., 38 Id. 260; see *dictum contra* in Brown v. N. Y. Cent. R. Co., 32 Id. 597; Mooney v. Hudson River R. R. Co., 5 Rob. 548.

[2] See notes, *ante*.

[3] Earhart v. Ne. Orleans etc. R. R. Co., 17 La. Ann. 243.

[4] Keller v. New York Cent. R. R. Co., 24 How. Pr. 172; McIntyre v. New York Cent. R. R. Co., 43 Barb. 532.

[5] Gay v. Winter, 34 Cal. 153.

[6] Id.

[7] Id.

§ 1853. **Widow and Next of Kin.**—It was held in the superior court of New York that a complaint of this kind must expressly allege that there is a widow, or next of kin, giving their names, and alleging that they had sustained pecuniary injury.[1] But the doctrine of this case is entirely inconsistent with the later cases.[2]

§ 1854. **Against a Municipal Corporation, for Injuries Caused by Leaving the Street in an Insecure State.**

Form No. 462.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a municipal corporation, duly organized under the laws of this state.

II. That, among other things, it is, by its charter, made its duty to keep the streets in said city in good order, and at all times properly to protect any excavations made in said streets, by placing lights and signals thereat to indicate danger.

III. That a certain street in said city, known as ....., was and is a common thoroughfare, and used by the citizens thereof and others; and that the duty of said defendant as to said street was, and became at the time hereinafter mentioned, a matter of public and general concern.

IV. That on or about the ..... day of ....., 18..., a deep and dangerous excavation [hole or trench] was dug in said street [or an obstruction was placed in said street, and negligently left therein], and suffered by the defendant, during a night on or about said day, to remain open, exposed, and without proper protection, and without any light or signal to indicate danger.

V. That the plaintiff on the night aforesaid was lawfully traveling on said street, and was wholly unaware of danger, and was accidentally, and without fault or negligence on his part, precipitated into said excavation [hole or trench], whereby he received great bodily injury, and was made sick and sore, and was thereby kept to his bed, and detained from business for ..... days, and was in consequence thereof compelled to

[1] Safford v. Drew, 3 Duer, 627.

[2] Chapman v. Rothwell, El. Bl. & El. 168; Quin v. Moore, 15 N. Y. 436; Oldfield v. New York and Harlem R. R., 14 Id. 316; Dickens v. New York Central R. R., 28 Barb. 41; Keller v. New York Central R. R., 17 How. Pr. 102. The first of these cases expressly decides that no allegation of damage to the next of kin is necessary; and though the whole doctrine of Safford v. Drew is not overruled in terms, yet it is in effect, and that nominal damages, at least, may be recovered on the above complaint, with liberty to prove actual damage. In California, however, the statute especially provides for this class of actions: See Cal. Code C. P., secs. 376, 377.

expend ..... dollars for medical attendance and nursing, and has been made permanently lame, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1855. **Cause of Death.**—The responsibility in cases of a personal injury from falling through a defective sidewalk is upon him who has the control and management of the work.[1]

§ 1856. **Corporation, Liability of.**—A city having the power and duty of lighting its streets is liable for injuries or death caused by a party's falling off a bridge, opened for the passage of a vessel, in consequence of its being insufficiently lighted.[2] It is not liable for negligence of a member of paid fire department.[3]

§ 1857. **Defect in Highways.**—Where plaintiff was injured owing to a defect in a highway, but would not have been if the horse had not been vicious—he had never driven the horse before, and did not know of its viciousness—it was held that plaintiff could recover substantial damages.[4]

§ 1858. **Drover, Liability of.**—The law governing the liability of persons for driving cattle through the streets of a city, for damages caused by injuring a person lawfully in the street, without any fault on his part, is the same as that by which the carriers of passengers are governed.[5]

§ 1859. **Dug, Opened, and Made.**—In a suit caused by a person's falling into an area in a public sidewalk, a declaration charging that the defendant "dug, opened, and made" the area, is sustained by proof that he formed it partially by excavation, and partially by raising walls.[6]

§ 1860. **Foundation of Action.**—The foundation of this action is the personal tort of the defendant, and not of his testators. The defect in the street from which the injury resulted to plaintiff is not alleged to have existed anterior to the death of such testator; hence no obligation was incurred by the testator in his life-time in respect thereto, which could serve as a basis for a valid claim against his estate, or a right of action against the administrator of his estate as such.[7]

[1] Boswell v. Laird, 8 Cal. 469; Fanjoy v. Seales, 29 Id. 243; followed in Du Pratt v. Lick, 38 Id. 691; see also Eustace v. Jahns, Id. 3.

[2] Chicago v. Powers, 42 Ill. 169; see as to sidewalks, Bloomington, City of, v. Bay, Id. 503. As to the liability of corporations for neglect to have proper precautions taken for the safety of the public, see Grant v. City of Brooklyn, 41 Barb. 381; Davenport v. Rickman, 10 Bosw. 20.

[3] Howard v. San Francisco, 51 Cal. 52.

[4] Daniels v. Town of Saybrook, 34 Conn. 377.

[5] Ficken v. Jones, 28 Cal. 618.

[6] Robbins v. Chicago City, 4 Wall. U. S. 657.

[7] Eustace v. Jahns, 38 Cal. 3.

§ 1861. **Non-repair of Premises.**— A complaint against the owner of premises leased to a third person, to recover damages sustained by plaintiff by the falling of a part of the building through want of repairs, is bad on demurrer, unless it states facts from which the court can say that the owner was bound to keep the premises in repair. A mere general allegation that defendant was bound to keep the premises in repair is insufficient.[1]

§ 1862. **Respondeat Superior.**—The responsibility, in cases of personal injuries, is upon him who has the control and management of the work, and the relation of *respondeat superior* has no application where the relation of master and servant does not exist.[2] Where there is no power of selection or direction, there can be no superior, and where a man is employed to do the work with his own means and by his own servant, he has the power of selection and direction, and he, and not the person for whom the work is principally done, is the superior.[3]

§ 1863. **Street Contractor—Liabilities.**—The responsibility in cases of repairs in public streets made by a contractor rests upon him who has control and management of the work. The doctrine of *respondeat superior* has no application where the relation of master and servant does not exist, but where a man is employed to do the work with his own means and by his own servants, he and not the person for whom the work is being primarily done is the superior.[4] The law does not impose upon the owner of a lot fronting on a street of an incorporated city, the duty to repair a defect in the portion of the public street upon which his lot abuts or fronts.[5] The only duty imposed upon him is the payment of the assessment which shall be lawfully imposed upon his lots or lands. So the owner of property is not liable for the torts of servants employed by the contractor,[6] nor for omission or negligence of contractor so employed.[7] But the principal contractor is liable for negligence of subcontractors and their servants.[8] So of a party

[1] Casey v. Mann, 5 Abb. Pr. 91; S. C., *sub nom.* Corey v. Mann, 14 How. Pr. 162, see Brown v. Harmon, 21 Barb. 508.

[2] Fanjoy v. Seales, 29 Cal. 243; the doctrine approved in Du Pratt v. Lick, 38 Id. 691.

[3] Fanjoy v. Seales, 29 Cal. 243; cited and followed in Du Pratt v. Lick, 38 Id. 691.

[4] Boswell v. Laird, 8 Cal. 469. The doctrine recognized in Fanjoy v. Seales, 29 Id. 243; and followed in the cases of Du Pratt v. Lick, 38 Id. 791; O'Hale v. Sacramento, 48 Id. 212, and Krause v. Sacramento, Id. 221.

[5] Eustace v. Johns, 38 Cal. 8.

[6] Van Wert v. City of Brooklyn, 28 How. Pr. 451; O'Rourke v. Hart, 7 Bosw. 511; Schular v. Hudson River R. R. Co., 38 Barb. 653.

[7] Fish v. Dodge, 38 Barb. 163; Benedict v. Martin, 36 Id. 288.

[8] Creed v. Hartmat, 29 N. Y. 591.

obtaining authority to do work in a public street.[1] But public officers are not within the rule of employer and employee, and are not responsible for persons employed under them.[2] Where a party was injured by falling at night into an excavation made in grading the street of a city, under a city contract, given out in obedience to the law, owing to the failure to put lights or guards about the place, the contractor and not the city is liable.[3]

§ 1864. **For Injuries Caused by Rubbish in the Street, Whereby Plaintiff was Thrown from his Carriage.**

Form No. 463.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, on or about the ..... day of ....., 18..., wrongfully placed large quantities of lumber and bricks in the public highway [known as ..... street], in ....., and negligently left the same therein, obstructing the highway during the night-time, and without proper protection or notice to citizens and travelers against accidents.

II. That by reason of said negligence and improper conduct of the defendant, in the night-time of that day, the carriage of the plaintiff, with the plaintiff therein, then passing through said street, was accidentally driven against the said lumber and earth, and was thereby overturned; by means whereof the plaintiff was bruised and wounded, and was for ..... days prevented from attending to his business, and was compelled to expend, and did expend ..... dollars for medical attendance and nursing, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1865. **Mutual Negligence.**—Where a child was killed by the fall of a counter on which he was climbing, and which had been left in the street of a city for two or three weeks, the child being six years old, and at the time of his death playing unattended six blocks from home, it was held that the city was no more negligent than the parents of the child, and was not liable.[4]

§ 1866. **For Injuries Caused by Leaving a Hatchway Open.**

Form No. 464.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., the defendant was

[1] McCamus v. Citizens' Gas Light Co., 40 Barb. 380.

[2] Murphy v. Commissioners of Immigration, 27 How. Pr. 41.

[3] James v. San Francisco, City of, 6 Cal. 528.

[4] Chicago v. Starr, 42 Ill. 174.

the occupant of the [store No. .., ... street], and had possession and control of the hatchway hereinafter mentioned.

II. That on the said day the plaintiff was in the said [store or building], by permission of the defendant, for the purpose of transacting business with him [or in the discharge of his duties as—state what].

III. That the hatchway on the [second] story of the said building was then, by the negligence of the defendant, left open, and not in any manner protected.

IV. That in consequence thereof the plaintiff fell through the said hatchway, and was much injured [state special damage, if any, as], and was confined to his bed and detained from business for ..... days, was compelled to expend .. .. dollars for medical attendance and nursing, and has been made permanently lame, to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1867. The Same—Another Form.

Form No. 465.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18.., at ....., the defendant was the owner, and had possession and control of a certain building and premises [describe them], with the appurtenances thereto belonging, which building was then occupied by him as [designate the uses of a building, if a public resort].

II. That said building was negligently and carelessly built, inasmuch as there was in the public hall in the third story of the same, at the time of its erection and leasing by the defendant, as well as at the time hereinbefore mentioned, an unguarded hatchway, opening into the second story.

III. That the defendant, well knowing the premises, and while the owner and occupant [or while the occupant] of said building, did on the day and year aforesaid, negligently leave the same open and unprotected, by means whereof the plaintiff, who was then lawfully in said building, and in pursuit of his business [or otherwise show for what purpose, and by what right, the plaintiff was there], then and there necessarily and carefully passing along said hall, fell through said hatchway.

IV. That in consequence thereof the plaintiff was greatly injured, and became sick and lame, and so remained for a long time [or so still remains], and was during the space of ....., prevented from attending to his business as ....., and was compelled to expend ..... dollars for medical attendance

[or otherwise state injuries to plaintiff], to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1868. For Injuries Caused by Vicious Dog.

Form No. 466.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day of ....., 18..., at ....., the defendant was the keeper [or owner] of a certain vicious dog, which was accustomed to bite mankind.

II. That the said defendant, well knowing the premises, did wrongfully and injuriously keep and harbor the said vicious dog, and wrongfully and negligently suffered such dog to go at large, without being properly guarded or confined.

III. That while so kept as aforesaid, the said dog did bite and greatly wound this plaintiff [state the particulars], whereby this plaintiff became sick and sore and lame, and so continued for the space of [six months] thence next following; and was obliged to pay, and did expend ..... dollars for medical attendance consequent thereon, and was prevented during all said months of sickness from attending to his lawful affairs, to his damage .... dollars.

[DEMAND OF JUDGMENT.]

§ 1869. **Averments Essential.**—The averment that he was of a mischievous or ferocious nature is simply an averment that the dog would bite men, that he was accustomed to bite, and this is best evidenced by the fact that he did bite plaintiff. There are three necessary averments: 1. That the dog would bite mankind; 2. That the owner or keeper knew it; and, 3. That he did bite plaintiff. When all this is proved, it matters not how carefully the dog was kept; the owner or keeper has no right to keep such a dog at all.[1] Chitty advises counts averring that the dog was of a ferocious and mischievous nature, and also for not keeping the dog properly secured or fed, as the facts may be.[2]

§ 1870. **Mischievous Animals.**—The gist of an action for keeping a mischievous animal, at common law, is the keeping of the animal after knowledge of its mischievous propensities. And a declaration is sufficient which alleges the ferocity of the animal, and the knowledge of the defendant, without any negligence or want of care.[3]

[1] M'Caskill v. Elliot, 5 Strobh. 196; but the cases of Jones v. Perry, 2 Esp. 482, and Cockerham v. Nixon, 11 Ired. 269, seem to make a distinction.

[2] 2 Chit. Pl. 597.

[3] Popplewell v. Pierce, 10 Cush. 509, and cases there cited.

§ 1871. **Ownership.**—It is not necessary, in an action for damages sustained by the bite of a dog, for the plaintiff to prove that the defendant owned the dog. It is sufficient on this point for the plaintiff to prove that the defendant kept the dog.[1]

§ 1872. **Scienter.**—The *scienter* must be alleged and proved.[2]

§ 1873. **Vicious Horse.**—Defendant negligently let his horse go loose and unattended in the street of a city, where the horse kicked the plaintiff; it was held that defendant was liable, without proof that the horse was vicious.[3]

§ 1874. **Against Physician for Maltreatment.**

Form No. 467.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is, and since the .... day of ....., 18..., has been a physician, and that the plaintiff, at ....., in the month of ....., 18..., employed the defendant as such, to cure him of a malady from which he then suffered, for compensation to be paid therefor, and for that purpose the defendant undertook, as a physician, to attend and cure the plaintiff.

II. That the defendant entered upon such employment, but did not use due and proper care or skill in endeavoring to cure the plaintiff of the said malady, in this: the defendant did not [here state what defendant failed to do that he should have done, or what he did that he should not have done].

III. That by reason of the several premises, the plaintiff was injured in his health and constitution, suffered great pain, was weakened in body, and was obliged to and did expend the sum of ..... dollars, in endeavoring to be cured of the said sickness, which was prolonged and increased by the said unskillful and improper conduct of the defendant, to the damage of the plaintiff ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1875. **Implied Promise.**—The employment of a physician in this country raises an implied promise to pay for his services. The plaintiff in an action for malpractice may allege that defendant was a physician, and as such was called on by the plaintiff, and undertook as such to administer medicines, etc.

[1] Wilkinson v. Parrott, 32 Cal. 102; and see Ficken v. Jones, 28 Cal. 618.

[2] 1 M. & S. 238; Smith v. Pelah, 2 Strange, 1264; Vrooman v. Lawyer, 13 Johns. 339; Jones v. Perry, 2 Esp. 482; Beck v. Dyson, 4 Camp. 198; Judge v. Cox, 1 Starkie, 285; Blackman v. Simmons, 3 C. & P. 138; Marsh v. Jones, 21 Vt. 378; Van Leuven v. Lyke, 1 Comst. (N. Y.) 515.

[3] Dickson v. McCoy, 39 N. Y. 400; see also Norris v. Kohler, 41 Id. 42.

This is sufficient to raise a duty of skill and care on his part.[1] Evidence of reputed skill is held to be material.[2]

§ 1876. **Against Surgeon, for Malpractice.**

Form No. 468.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the ..... day ....., 18.., the plaintiff by accident broke his leg.

II. That he then employed the defendant, who is a surgeon, as such surgeon, for reasonable reward to be paid therefor, to set and heal the same.

III. That the defendant so negligently and unskillfully conducted himself, in attempting to set said leg of the plaintiff, that [here state the consequences, as, inflammation ensued, and the plaintiff was compelled to have his leg amputated].

IV. That by reason of said negligence and unskillfulness the plaintiff was made sick, and was kept ..... months from attending to his business as [engineer], and was compelled to pay and did pay ..... dollars expense for nursing, and is permanently a cripple; to his damage ..... dollars.

[DEMAND OF JUDGMENT.]

CHAPTER VI.

VIOLATION OF PERSONAL RIGHTS.

§ 1877. **Against Officers of an Election, for Refusing Plaintiff's Vote.**

Form No. 469.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendants were the inspectors and judges of an election duly held at ....., in and for the ..... precinct, in the city of ....., on the ..... day of ...., 18.., for the purpose of electing [state what officers], and being duly appointed and qualified as such inspectors and judges, the defendants had the polls open for said election at No. .... street [or at the school-house] in said town [or city] between the hours of ..... and ..... on the day aforesaid.

II. That the plaintiff then was, and for the space of ..... months had been a citizen of the state of ....., and then was, and for the space of ..... days had been, a resident

[1] Peck v. Martin, 17 Ind. 115. [2] Carpenter v. Blake, 50 N. Y. 696.

in said town [or ward, or otherwise, according to the statute], and was a legal elector at said election [or that the plaintiff was registered in the grand register of the city and county of ....., and was enrolled on the poll lists of the said ..... precinct].

III. That as such elector, the plaintiff, while the polls were so open, duly offered to the defendants his vote or ballot for the election of [insert what officers he offered to vote for, as sheriff, etc.], in and for said town, and requested them to received the same.

IV. That the defendants, not regarding their duty, wrongfully refused to receive or deposit the same, although they and each of them then well knew he was a qualified voter, whereby he was deprived of his vote at said election, to his damage..... dollars.

[DEMAND OF JUDGMENT.]

§ 1878. **Facts must be Alleged.**—In an action for refusing plaintiff's vote, the particular facts upon which plaintiff's right to vote depends, must be alleged.[1]

§ 1879. **Malice.**—The averment of malice is unnecessary.[2]

§ 1880. **For Criminal Conversation.**

Form No. 470.

[TITLE.]

The plaintiff complains, and alleges:

I. That A. B. is, and at the times hereinafter mentioned was, the wife of the plaintiff.

II. That on or about the ..... day of ....., 18... [the day or about the day the first act of adultery can be proved], and on other days after that day, defendant, wrongfully contriving and intending to injure the plaintiff, and to deprive him of the comfort, society, aid, and assistance of his wife [forcibly and without the consent of the said A. B.], wickedly, willfully, and maliciously debauched and carnally knew the said A. B., without the privity or consent of the plaintiff.

III. That by means of the premises, the affection which the said A. B. therefore had for the plaintiff was alienated and destroyed, and the plaintiff was deprived of the comfort, society, aid, and assistance which he otherwise would have had from the said A. B., and has suffered great distress of body and mind, to his great damage ..... dollars.

[DEMAND OF JUDGMENT.]

[1] Curry v. Cabliss, 37 Mo. 330.

[2] Jeffries v. Ankeny, 11 Ohio, 372; Thacker v. Hawk, Id. 376; Lincoln v. Hapgood, 11 Mass 350; Capen v. Foster, 12 Pick. 485; Osgood v. Bradley, 7 Greenl. 411.

§ 1881. **Character of Action.**—An action by the husband, for *crim. con.*, is an action for injury to the person.[1]

§ 1882. **Contriving and Intending.**—The intention is material.[2]

§ 1883. **Marriage.**—In an action for criminal conversation, the plaintiff must prove an actual marriage.[3]

§ 1884. **For Enticing Away Plaintiff's Wife.**

Form No. 471.

[TITLE.]

The plaintiff complains, and alleges:

I. That A. B. is, and at the times hereinafter mentioned was, the wife of the plaintiff.

II. That on or about the ..... day of ....., 18.., while the plaintiff was living and cohabiting with and supporting her, at ....., and while they were living together happily as man and wife, the defendant, wrongfully contriving and intending to injure the plaintiff, and to deprive him of her comfort, society, and assistance, maliciously enticed her away from the plaintiff's and her then residence in ....., to a separate residence in ....., and has ever since there detained and harbored her, against the consent of the plaintiff.

III. That by reason of the premises the plaintiff has been and still is wrongfully deprived by the defendant of the comfort, society, and aid of his said wife, and has suffered great distress of body and mind in consequence thereof, to his damage ..... dollars.

[DEMAND OF JUDGMENT.][4]

§ 1885. **Allegation that Defendant Knew.**—In an action for debauching a wife or servant, it is not necessary to allege or prove that the defendant knew that the female was the wife or servant of the plaintiff; though in an action for seducing away or harboring a wife or servant, such allegation and evidence are necessary.[5]

§ 1886. **Debauching a Daughter.**

Form No. 472.

[TITLE.]

The plaintiff complains, and alleges:

[1] 1 Chitty Pl. 137; 2 Id. 265; 2 Kent, 129; 3 Black. Com. 138; Delamater v. Russell, 4 How. Pr. 234; S. C., 2 Code R. 147.

[2] Hutcheson v. Peck, 5 Johns. 196.

[3] Morris v. Miller, 4 Burr. 2057; Peake's Law Ev. 300; Phil. on Ev., 7th ed., 206; Selw. N. P. 14, 16; see also 2 Chit. Pl. 643, note f.

[4] For a form nearly similar, see Scherpf v. Szadeczky, 1 Abb. Pr. 366.

[5] Fores v. Wilson, Peake N. P. C. 55; Peake's Law of Evidence, 134; Winsmore v. Greenback, Willes, 577; see 2 Chitty on Pleading, 642, note e; see Hermance v. James, 32 How. Pr. 142.

I. That said defendant, unjustly intending to injure said plaintiff, and to deprive him of the services and assistance of the daughter and servant of said plaintiff, did, on the ..... day of ....., 18.., and on divers other days between that day and the commencement of this action, debauch and carnally know the said ....., then and there, before and since, the daughter and servant of said plaintiff, whereby the said ..... became pregnant and sick with child, and so remained for a long space of time, to wit, for the space of nine months, thence next following; at the expiration whereof the said ..... was delivered of the child with which she was pregnant, as aforesaid.

II. That by means of the premises, the said ....., for a long space of time, to wit [one year] was unable to do the needful business of the said plaintiff, he, the said plaintiff, so being the father and master of the said ....., and the said plaintiff lost the services of the said .... during all that time; and the said plaintiff was put to great expense, and did pay out a large sum, to wit, the sum of ..... dollars, in and about the nursing and taking care of the said ....., his daughter and servant, and in and about the delivery of said child, to his damage in the sum of ..... dollars.

[DEMAND OF JUDGMENT.]

§ 1887. **Connivance.**—The connivance of the father in the act of seduction will wholly bar his action, but where the defense is omitted to be pleaded, it will be waived.[1]

§ 1888. **Daughter Temporarily Absent.**—This action is maintainable, though the daughter be temporarily absent at the time of seduction.[2]

§ 1889. **Debauching and Beating a Daughter.**—A parent, in that character merely, can not support an action for debauching or beating his daughter, which is only sustainable in respect to the supposed loss of service, some slight evidence of which must in general be adduced.[3]

§ 1890. **Distress of Body and Mind.**—The fact that the plaintiff has suffered great distress of body and mind is a good ground of damages.[4]

§ 1891. **Father, Action by.**—A father may maintain an action for the seduction of his daughter, under twenty-one years of age, although she was not living with him at the time, if he

[1] Travis v. Barger, 24 Barb. 614.
[2] Lipe v. Eisenlerd, 32 N. Y. 229; see Cal. Code Civil Proc., sec. 375.
[3] 5 East, 45; 5 T. R. 360; see 2 Chit. Pl. 648, note 9; White v. Nellis, 31 N. Y. 405.
[4] Dain v. Wycoff, 7 N. Y. 191.

has not by his own act destroyed his right to control her services.[1] So for that of a daughter over twenty-one, and not living with him, if he thereby loses actual services due to him; and services rendered will be presumed to be due if he continues to exercise authority over her, and she to submit.[2]

§ 1892. **Female Seduced can not Maintain Action.**—At common law the female seduced can not maintain an action for her own seduction.[3] But by section 374, California code civil procedure, an unmarried female may maintain the action.[4] Under a similar statute in Indiana it was held that the complaint must allege that the plaintiff was unmarried.[5] A seduction, where it exists, is frequently alleged in a suit for breach of promise of marriage in aggravation of damages, but not as a separate cause of action. It is doubtful if breach of promise of marriage and seduction could be joined as distinct causes of action even under a statute authorizing the female to sue for seduction, as the one arises from contract, and the other from tort.

§ 1893. **Full Age.**—A father may maintain an action for seduction of his daughter who resides with him, and performs domestic services in return for support, notwithstanding she is of full age and that no express agreement exists for services.[6]

§ 1894. **Gist of Action.**—The loss of service is the gist of the action, and the master can alone sustain the action If the daughter is not living with her father, he can not sue for seduction.[7]

§ 1895. **Minor.**—As regards a minor, it seems that one standing *in loco parentis* has a right to maintain an action for seduction.[8]

§ 1896. **Mother, Action by.**—Under statutory provision, such action may be maintained by a mother keeping a boarding-house on her separate account, though the father be living at the time, if the father has abandoned his family.[9]

§ 1897. **Nature of Action.**—The action is not maintainable

[1] Greenwood v. Greenwood, 28 Md. 369.

[2] Sutton v. Huffman, 3 Vroom, 58; Lipe v Eisenlerd, 32 N. Y. 229.

[3] Hamilton v. Lomax, 26 Barb. 615; S. C., 6 Abb. Pr. 142.

[4] See *ante*, sec. 157; see also Koenig v. Nott, 8 Abb. Pr. 384.

[5] Thompson v. Young, 51 Ind. 599; see form No. 474, *post*.

[6] 2 T. R. 166; Id. 4; Irwin v. Dearman, 11 East, 23; Manvell v. Thomson, 2 Car. & P. 303; Moran v. Dawes, 4 Cow. 412; Lipe v. Eisenlerd 32 N. Y. 229.

[7] Briggs v. Evans, 5 Ired. 16; Hewit v. Prime, 21 Wend. 79; Martin v. Payne, 9 Johns. 387; Applegate v. Ruble, 2 A. K. Marsh. 128; Gillet v. Mead, 7 Wend. 193; Clark v. Fitch, 2 Id. 459.

[8] Bartley v. Richtmyer, 4 Comst. 38 (43); Bracy v. Kibbe, 31 Barb. 273.

[9] Badgley v. Decker, 44 Barb. 577; see also *ante*, sec. 157, and sec. 375, Cal. Code C. P.

by a parent, as such, but as a master entitled to services of child.[1]

§ 1898. **Step-father.**— A step-father can not sue for the seduction of his step-daughter while living in the service of another [2]

§ 1899. **For Seduction of Plaintiff's Daughter or Servant.**

Form No. 473.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, one A. B. was the servant [and daughter] of the plaintiff.

II. That on the ..... day of ....., 18.., at ....., the defendant, well knowing the said A. B. to be the servant [and daughter] of the plaintiff, and wrongfully contriving and intending to injure the plaintiff, and to deprive him of her assistance and service, did wickedly and maliciously, and without the privity or consent of the plaintiff [forcibly and against the will of the said A. B., abduct her, or entice and persuade the said A. B. to leave the residence and service of this plaintiff, and did] then and there debauch and carnally know her.

III. That by reason of the premises the said A. B. became pregnant and sick with child, and so remained for the space of ..... months; that during that time she was unable to attend to the dut es of her service, and the plaintiff was thereby deprived of her service, and was obliged to, and actually did, expend ..... dollars in nursing and taking care of her in her said pregnancy and sickness, and was otherwise greatly injured, to his damage ..... dollars.[3]

[DEMAND OF JUDGMENT.]

§ 1900. **For Seduction, by Female Seduced.**

Form No. 474.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of the commission of the grievances hereinafter mentioned, the plaintiff was and still is an unmarried woman, and all times prior thereto had been chaste and virtuous.

II. That on the ..... day of ....., 18...., at ...., the defendant, with force and violence, made an indecent assault upon the plaintiff and then and there wickedly seduced, de-

[1] White v Nellis, 31 N. Y. 405.
[2] Bartley v. Richtmeyer, 4 Comst. 38; Bracy v. Kibbe, 31 Barb. 273.
[3] This is from Abbott's Forms.

debauched and carnally knew her, whereby she became sick and pregnant with child, and so remained for a long space of time, to wit, for the space of nine months; at the expiration of which time, and on the ..... day of ....., 18..., she was delivered of the child of which she was so pregnant.

III. That by reason of the premises, and in consequence of the seduction aforesaid, the plaintiff has suffered greatly in her health, and became sick, and was prevented for a long space of time, to wit, for the space of ..... months, from attending to her ordinary business and affairs, and was greatly afflicted in body and mind, and has been put to great expense for medical attendance and nursing, and has been otherwise greatly injured, to her damage ..... dollars.

[Demand of Judgment.]

§ 1901. **Statute of Limitations.**—The statute of limitations does not commence to run against the right of action for the seduction of a minor until she attains her majority.[1]

[1] Morrell v. Morgan, 8 West Coast Rep. 683.

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